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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~300.~~ 41

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, APPELLANT,

vs.

WALTER S. JOHNSTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 12, 1886.

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1 To the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

The St. Louis and San Francisco Railway Company, a citizen of the State Missouri, brings this its bill against Walter S. Johnson, of the city of New York, a citizen of the State of New York; and thereupon your orator complains and says:

At all the times hereinafter mentioned your orator was, and it now is, a corporation organized under and by virtue of the laws of the State of Missouri, and a citizen of that State, having also an office and place for the transaction of business, and offices, in the city of New York, in the southern district of New York, and the defendant was and is a citizen of the State of New York.

The Marine National Bank of the City of New York was and is a banking corporation organized under and in pursuance of an act of Congress of the United States, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, being chapter 106 of the statutes of 1864, and on and prior to 5th of May, 1884, was engaged in the business of banking in the city of New York.

Your orator, on the 5th of May, 1884, and long prior thereto, kept an account with said Marine National Bank, and from time to time deposited large sums of money with the said bank, and also from time to time entrusted to the said bank checks, drafts, notes and bills of exchange for collection. On the 5th of May, 1884, the

2 Atchison, Topeka and Santa Fé Railroad Company was indebted to your orator for money paid by your orator in the sum of $17,835, and thereupon, on the same day, at the city of New York, your orator, by Thomas W. Lillie, its treasurer, drew its draft or bill of exchange, bearing date on that day, and addressed to G. L. Goodwin, Esq., assistant treasurer Atchison, Topeka and Santa Fé Railroad Company, at Boston, Massachusetts, requesting him to pay to the order of the said Marine National Bank seventeen thousand eight hundred and thirty-five dollars and charge the same, as advised, to account of your orator, and your orator, on the same day, delivered the said draft to the said bank and requested the bank to collect the same for your orator, which the bank then and there consented and agreed to do, and received the said draft for that purpose only. The said bank never paid or advanced anything to your orator for or in respect to said draft; and your orator was not then, nor has it since been, indebted to the said bank in any respect or any amount whatever, but, on the contrary, the said bank was and is indebted to your orator for money deposited with it to a very large amount.

The said bank knew, and so the fact is, that your orator did not intend to, and did not, sell, assign, or transfer the said draft or its proceeds to the said bank, nor in anywise part with its interest in or title to the same, but delivered the said draft to the said bank for no other purpose than to enable the said bank to collect it for your orator.

On the said 5th day of May it was well known to the said bank and to its officers, and so the fact was, that the said bank was insolvent, and well knowing the fact the said bank wrongfully neglected to disclose the same to your orator, but by continuing business with open doors, and otherwise representing to your orator and all other persons dealing with it that the said bank was solvent, and on the faith of such representations your orator believed the said bank to be solvent, and had no knowledge or suspicion or means of knowing that it was insolvent or in danger of becoming so, and,

3 acting upon such representations and relying on the solvency of said bank, your orator delivered the said draft to it, and the bank received the same for collection, as aforesaid. Thereafter, and on the same day, the said bank, by its cashier, endorsed the said draft as follows: "Pay Atlantic National Bank of Boston or order, for collection, for account of Marine National Bank of the city of New York," and transmitted the said draft so endorsed to the said Atlantic National Bank for collection.

On the morning of the 6th of May, 1884, the said Marine National Bank did not open its doors for business, and its insolvency became open and notorious, and it refused to pay its circulating notes on due demand, and made default and has ever since continued insolvent and in default, and thereafter, and on or about the 13th of May, 1884, the Comptroller of the Currency, in pursuance of the said statute of the United States, duly appointed the defendant, Walter S. Johnston, receiver of the said Marine National Bank, and the said defendant duly qualified and entered upon the discharge of his duties of such receiver. After the insolvency, suspension and default of said bank, as hereinbefore mentioned, the said draft was collected by the said Atlantic National Bank of Boston, and thereafter the proceeds thereof, namely, $17,835, were paid by the last-named bank to the defendant herein, who received the same with full knowledge of all the matters hereinbefore stated, and although often requested has ever since wrongfully refused to pay the same to your orator.

Your orator is informed and believes that the defendant pretends that the said draft, when delivered to the said Marine National Bank, became the property of said bank, and that said bank became merely a debtor to your orator for the amount thereof, and that your orator stands on the same footing in respect to said draft as any general creditor of the said bank in respect to his claim, as, for instance, a creditor for money deposited; whereas, your orator is advised and insists that, by reason of the premises, the said draft,

4 when delivered as aforesaid to the said bank, did not become the property of the said bank, and that your orator did not part with its title to or interest in the said draft, but that it remained the property of your orator, and that the proceeds of the said draft, when collected, likewise did not become the property of the said bank, or of the defendant, but remained always, and still are, the property of your orator, and your orator is entitled to follow them specifically into the hands of the defendant and to recover them from him. To the end, therefore, that the said Walter S.

Johnston, to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid (your orator hereby waiving the necessity of the answer of the defendant being put in under oath), and that as fully as if the same were here repeated and he distinctly interrogated thereto.

And that an account may be taken, by and under the direction of this honorable court, of and concerning the draft hereinbefore mentioned, and of the proceeds thereof, and of all sums received by the defendant, or with which he is chargeable for or on account of the said draft or its proceeds; and that the proceeds of the said draft may be adjudged to be the property of your orator; and that the defendant may be decreed to pay unto your orator all sums received or collected by him, or with which may be found chargeable for or on account of the said draft or its proceeds; and that he be enjoined and restrained from parting with or disposing of the said proceeds or any part thereof, except to this plaintiff, and may be so enjoined and restrained during the pendency of this suit; and that your orator may have such other or further relief in the premises as the nature of the circumstances of this case may require, and as to your honors shall seem meet, may it please your honors to grant unto your orator a writ of subpœna, to be directed to the said Walter S. Johnston, thereby commanding him, at a certain time and under a certain penalty, therein to be limited, personally to appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
By T. W. LILLIE, *Treasurer.*

BURRILL, ZABRISKIE & BURRILL,
Complainant's Solicitors.

G. ZABRISKIE,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Thomas W. Lillie, being duly sworn, says that he is the treasurer of The St. Louis and San Francisco Railway Company, the complainant in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on the information and belief of the complainant, and as to such matters he believes it to be true.

T. W. LILLIE.

Sworn to before me this sixteenth day of September, 1884.

DAN. RUMBOLD,
Notary Public (74), *N. Y. Co.*

Circuit Court of the United States, Southern District of New York.

The answer of Walter S. Johnson, defendant, to the bill of complaint of The St. Louis and San Francisco Railway Company, complainant.

6 This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, answers and says that he admits that, as stated in its said bill of complaint, the complainant is a corporation organized under the laws of the State of Missouri and a citizen of that State, and having an office in the city of New York, and that this defendant was and is a citizen of the State of New York, and that the Marine National Bank was at the time in said bill of complaint stated and is a banking corporation, as stated in said bill of complaint; and that complainant, on the 5th day of May, 1884, and long prior thereto, kept an account with the said The Marine National Bank, and from time to time deposited large sums of money with said bank.

And this defendant, further answering, says that he knows not, and has not been informed, save by the said complainant's said bill, and cannot set forth, as to his belief or otherwise, whether said complainant from time to time entrusted to the said bank checks, drafts, notes, or bills of exchange for collection.

And this defendant, further answering, admits that the Atchison, Topeka and Sante Fé Railroad Company drew and delivered to complainant the draft or bill of exchange in said bill of complaint set forth, and that said complainant, on the 5th day of May, 1884, delivered the same to said Marine Bank.

And this defendant, further answering, denies that the complainant, at the time of such delivery, or at any other time, requested said bank to collect the same for said complainant, or that said bank then and there, or at any other time, consented or agreed so to do, or that said bank received said draft for collection.

And this defendant, further answering, admits that said complainant was not then or since indebted to said bank in any
7 respect or in any manner whatever, and that said bank was and is indebted to said complainant for money deposited with it.

And this defendant, further answering, denies that said bank knew, or that such is the fact, that said complainant did not intend to or did not sell, assign, and transfer the said draft and its proceeds to the said bank, or in anywise part with its interest in or title to the same, or that said complainant delivered the said draft to the said bank for no other purpose than to enable the said bank to collect it for said complainant, but avers that the said draft was deposited by the said complainant in the ordinary course of business as a depositor with said bank, and to be carried to its account.

And this defendant, further answering, denies that on the 5th day of May, 1884, it was well or otherwise known to the said bank or to its officers, or that such was the fact, that the said bank was insolvent, or that well or otherwise knowing the fact that the said bank, wrongfully or otherwise, neglected to disclose the same to the complainant.

And this defendant, further answering, denies that said complainant, acting upon any representation of said bank, or relying upon the solvency thereof, delivered the said draft to it, or that the said bank received the same for collection.

And this defendant, further answering, admits that thereafter, and on the same day, the said bank, by its cashier, endorsed the said draft as set forth in the bill of complaint herein, and transmitted the same, so indorsed, to the Atlantic National Bank of Boston for collection; but this defendant denies that on the morn- of the 6th of May, 1884, the said Marine Bank did not open its doors for business, as stated in said bill of complaint, and this defendant states that the said bank did open its doors upon said day and transacted business; but thereafter, and on the same day, the said bank did close its doors, and that thereafter, and not before, its insolvency became open and notorious, and its refusal to pay its circulating notes on due demand occurred and it made default, and has ever since continued insolvent and in default,

8 and that thereafter, and on or about the 13th day of May, 1884, the Comptroller of the Currency, in pursuance of the statutes of the United States, duly appointed this defendant receiver thereof, and this defendant duly qualified and entered upon the discharge of his duties as such receiver.

And this defendant, further answering, denies that after the insolvency, suspension, or default of said bank, as in said bill of complaint set forth, said draft was collected by the said Atlantic National Bank of Boston, but he states that said draft was collected by said Atlantic National Bank prior to the insolvency, suspension, or default of said Marine National Bank, and thereafter the proceeds thereof, viz., $17,835, were paid by said The Atlantic National Bank of Boston to this defendant.

And this defendant denies that he received the same with full or any knowledge of the matters stated in the bill of complaint herein.

And this defendant, further answering, admits that he has refused to pay the same to the complainant herein.

And this defendant, further answering, states that the said draft or bill of exchange was deposited by said complainant and received by said The Marine Bank as a deposit in cash and was immediately credited to said complainant as cash in the usual course of business and agreement with said complainant, and that an entry to that effect was, at the time of receiving said draft, made in the books of said bank and in the bank or pass book of the said complainant, and said bank or pass book returned to said complainant by said The Marine National Bank at said time, and thereupon said draft and the proceeds thereof when collected became the property of

said The Marine Bank, and said bank forthwith became indebted to said complainant in the amount thereof.

And this defendant, further answering, denies that the said complainant is entitled to the relief or any part thereof in the said complaint demanded.

9 And this defendant prays the same advantage of his aforesaid answer as if he had pleaded or demurred to the said bill of complaint.

And this defendant prays leave to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) WALTER S. JOHNSTON.

DEVELIN & MILLER,
Solicitors for Defendant.

(Signed) JOHN E. DEVELIN,
Of Counsel for Defendant.

Circuit Court of the United States, Southern District of New York.

The replication of The St. Louis and San Francisco Railway Company, complainant, to the answer of Walter S. Johnston, defendant.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver

10 and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

BURRILL, ZABRISKIE & BURRILL,
Complainant's Solicitors.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

United States Circuit Court, Southern District of New York.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY
against
WALTER S. JOHNSON.

I, James A. Renwick, one of the standing examiners of the United States circuit court for the southern district of New York, do hereby certify that the annexed depositions of George Butler, William J. Brooks, H. H. Borrow, O. D. Baldwin, John H. Carr, William A. Camp, George W. Force, W. S. Johnston, Thos. W. Lillie, and W. F. Rossell were taken before me under and pursuant to the 67th

rule of the Supreme Court of the United States, in equity, as amended, at the times and places in said depositions specified.

That the parties to said cause were present at the taking of the same—complainant, by its solicitors, Messrs. Burrill, Zabriskie & Burrill, and defendant, by his solicitors, Messrs. Develin & Miller.

That the said Butler, Brooks, Borrow, Baldwin, Carr, Camp, Force, Johnston, Lillie, and Rossell were by me duly sworn to testify
11 the truth, the whole truth, and nothing but the truth in the cause aforesaid; that their depositions were reduced to writing from their statements, as herein appears.

And I do further certify that I am not attorney nor of counsel for any of the parties in said depositions or caption named, and am in nowise interested in the result of this suit.

In testimony whereof I have hereunto set my hand, at New York, on this 4th day of February, 1886.

JAMES A. RENWICK,
U. S. Standing Examiner.

12 United States Circuit Court for the Southern District of New York.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY
against
WALTER S. JOHNSTON.

Proofs for final hearing, taken on the part of the plaintiff before James A. Renwick, Esq., one of the standing examiners of the circuit court of the United States for the southern district of New York, under and pursuant to the 67th rule of the Supreme Court of the United States, in equity, as amended.

NEW YORK, *February 11th*, 1885.

Parties met pursuant to notice.

Present: J. E. Burrill, Esq., for plaintiff; Charles E. Miller, Esq., for defendant.

Questions and answers taken subject to all legal objections and exceptions.

THOMAS W. LILLIE, a witness called on behalf of plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. BURRILL:

Q. What is your name, age, and occupation?

A. My name is Thomas W. Lillie; age, 42, and occupation secretary and treasurer of the St. Louis and San Francisco Railway Company.

Q. How long have you held such office?

A. Five years.

Q. Did the plaintiff in this action have an account with the
13 Marine National Bank of the city of New York; and, if so, for how long a time did they have such an account?

A. They had an account there up to the time of the bank's failure and for many years before.

Q. How many years before?

A. More than five, to my knowledge.

Q. Did you on the 5th of May, 1884, as treasurer of the plaintiff in this action, draw a draft on the assistant treasurer of the Atchison, Topeka and Santa Fé Railroad Company at Boston, Massachusetts?

A. Yes.

Q. What was the amount of that draft?

A. $17,835.

Q. Look at the paper now shown you and state whether it is a copy of the said draft, according to your best recollection, without regard to the endorsements.

Paper shown witness.

A. Yes, sir.

Following is a copy of the draft:

"$17,835. NEW YORK, *May 5th*, 1884.

"Pay to the order of the Marine National Bank seventeen thousand eight hundred and thirty-five dollars, value received, and charge the same to account of as advised.

"ST. LOUIS AND SAN FRANCISCO
RAILWAY COMPANY,
"T. W. LILLIE, *Treasurer.*

"To G. L. Goodwin, Esq., assistant treasurer Atchison, Topeka, St. Fé Railroad Co., Boston, Mass."

Q. When did you last see that draft?

A. On the 5th of May, 1884.

Q. When you signed it to whom did you deliver it?

A. To the assistant treasurer.

Q. Who is he?

A. George Butler.

14 Q. Have you ever seen that draft since?

A. No, sir.

Q. Is the book now shown you the pass-book of the plaintiffs with the Marine National Bank.

Book shown witness.

A. Yes, sir.

Q. Who had actual possession of that book on the 1st of May, 1884?

A. I don't remember.

Q. Did your company have it?

A. I know that our company did not have it on the 5th of May, 1884.

Q. Was it usual to send it to the bank at stated periods to be made up?

A. No, sir.

Q. How was this with reference to the first of the month?

A. I don't know.

Q. When did that book come into the possession of the plaintiff, after the 5th of May, 1884?

A. Not before the 19th of May, 1884.

Q. When this draft was signed by you and delivered to Mr. Butler, the assistant treasurer of the plaintiff, the pass-book was in the possession of the plaintiff?

A. No, sir; it was not.

Q. State, if you please, where this pass-book was between the 5th of May, 1884, and the time you received it on the 19th of May, 1884.

A. In the Marine Bank.

Q. From whom was the pass-book received on the 19th of May, 1884?

A. From the receiver of the Marine Bank.

Q. Mr. Johnston?

A. Yes, sir; I mean after he was appointed receiver.

Q. So far as you have any knowledge, was there any entry made in that pass-book in regard to the $17,835 draft until after the Marine Bank had gone into the hands of a receiver?

15 A. No, sir.

Q. Did you at any time, and, if so, when, communicate with the receiver of the Marine Bank, by letter, in respect to this draft?

A. If my recollection serves me right, it was on the 17th of May, 1884.

Q. Look at the paper now shown you and state whether that is a copy of the letter.

Paper shown witness.

A. Yes, that is a copy of it. I saw the original this morning.

Letter introduced in evidence and marked Ex. A, Feb. 11th, 1885, O. F.

Q. Did you receive a communication from the receiver in reply to your letter, Ex. A? And, if so, produce the same.

A. Yes, sir; and I produce the same.

Letter read in evidence and marked Ex. B, of this date.

Q. Did the plaintiff after the receipt of Exhibit B, and, if so, when, take any steps to assert their claim upon the funds in the hands of the Atlantic National Bank of Boston?

A. Yes, sir; on May 19th we put the matter in the hands of our counsel.

Q. Do you know, and, if so, state, what was the first step taken by your counsel, by your directions, in respect to that claim.

A. They sent a telegram to their correspondents in Boston of which the following is a copy:

"NEW YORK, *May 19th*, 1884.

"Hutchins & Wheeler, Sears' building, Boston, Mass.:

"Among funds of Marine National Bank in hands of Atlantic National Bank of Boston attached by Everett National Bank are proceeds of draft on Atchison, Topeka and Santa Fé for seventeen thousand and odd dollars, drawn by my clients, the St. Louis and San Francisco Railway Company, and deposited by it with the Marine Bank for collection, and collection after its failure. Notify parties of our claim and do what is necessary to protect us. Letter by mail.

"J. E. BURRILL."

Q. Was there any arrangement between the plaintiff and the Marine Bank in regard to your being allowed interest for daily balances?

A. Yes, sir; we were allowed interest.

Q. On the 5th day of May, 1884, when this draft was sent to the Marine Bank, was that bank indebted to the plaintiffs?

A. Yes, sir.

Q. In about what amount? You need not say accurately.

A. About $120,000.

Q. Over $100,000?

A. Yes, sir.

Q. Did the plaintiffs draw any checks on the Marine National Bank after the 5th of May, 1884.

A. Yes; we drew some checks on the morning of the 6th of May, 1884.

Q. How many checks did you draw on that morning?

A. Not many.

Q. How many?

A. I don't know.

Q. Were they paid?

A. No, sir; the checks of May 6th were not paid. There may have been some of them, but the bulk of them came back.

Q. Charging you with all the checks which were paid by the Marine National Bank on the 6th of May, 1884, in what amount was that bank indebted to the plaintiffs after charging those checks?

17 A. Upwards of $100,000.

Q. In stating the indebtedness of the Marine National Bank to the plaintiffs did you or not include the $17,835 draft?

A. Not in stating this amount of upwards of $100,000; I did not.

Q. You say you don't include that?

A. No, sir; I do not include it.

Q. When you gave this draft for $17,835 to the assistant treasurer, Mr. Butler, on the 5th of May, 1884, did you give him any instructions in regard to it whatever?

A. No, sir.

Q. Who filled the draft up?

A. Mr. Butler filled up the draft and I signed it. That is my recollection.

Q. Did the plaintiff in this action ever draw against this draft?
A. No, sir.

It is stipulated by counsel that copies of Exhibits A and B be read in evidence in lieu of the originals and marked as such.

On cross-examination by Mr. MILLER, the witness states as follows:

The paper now shown me was filled up by Mr. Butler, the assistant treasurer of the plaintiff—that is, the words and figures "May 5th," "4," and the figures "17,835," on a line with the word "checks," are in his handwriting, and this is the ticket which was sent to the Marine Bank with the draft.

Following is a copy of the tickets:

18 "Deposited by the St. Louis & San Francisco Railway Co. in the Marine Bank May 5th, 1884.

	"Dollars.	Cents.
"Bills		
"Checks	$17,835"	

The whole of the ticket being in print, excepting the words and figures "May 5th" and "4," after "188," and "17,835," opposite "checks."

Defendant's counsel offers in evidence the endorsement of the draft upon which this action is brought.

The endorsement as appears on the copy of the draft introduced in evidence is as follows:

"Pay Atlantic National Bank of Boston or order, for collection, for account of Marine National Bank of the city of New York.

"L. D., *Cash'r.*"

Further hearing adjourned to February 12th, 1885, at 3 o'clock p. m.

NEW YORK, *February 12th*, 1885.

Parties met pursuant to adjournment.

Present: J. E. Burrill, Esq., for plaintiff; C. E. Miller, Esq., for defendant.

THOMAS W. LILLIE, recalled on behalf of the plaintiff, further testified as follows:

Direct examination by Mr. BURRILL:

Q. Did the plaintiff have any arrangement or understand-
19 ing with the defendant's bank in regard to allowing plaintiff to draw against this draft before its actual collection?

A. No, sir.

Q. Did the plaintiff have any arrangement or understanding with the Marine Bank in regard to the plaintiff's being allowed to draw against out-of-town paper lodged with the defendant's bank before its actual collection?

A. No.

Q. Did the plaintiff ever draw against out-of-town paper before its actual collection?

A. No.

Q. Do you know of any arrangement or understanding or dealing with the defendant's bank by which plaintiff was authorized or entitled to draw against this draft in controversy before its actual collection?

A. No, sir.

GEORGE BUTLER, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. BURRILL:

Q. What is your name, age, and occupation, and where do you reside?

A. My name is George Butler, age, 60 years; occupation, assistant treasurer; and I reside in Brooklyn.

Q. Are you assistant treasurer of the plaintiff; and, if so, how long have you held such office?

A. Yes; since 1881.

Q. For how long has the plaintiff kept an account with the Marine National Bank of the City of New York?

A. Since 1876.

Q. When and from whom did you receive the draft for $17,835, mentioned in the bill?

A. I made the draft and Mr. Lillie, the treasurer, signed it.

Q. Who took said draft to said bank on the 5th of May, 1884?

A. One of our clerks—the colored boy, I think.

20 Q. When the treasurer gave you the draft did he give you any instructions about it?

A. No.

Q. When you gave the draft to the messenger, who took it to the Marine Bank, did you give him any instructions?

A. Merely to take it to the Marine Bank.

Q. What did he take with him?

A. Nothing else but a ticket with the amount of the draft named on it.

Q. Where was the bank pass-book at that time?

A. At the bank.

Q. How long had it been with the Marine Bank and for what purpose did they have it?

A. Since April 30th, 1884; to be written up and balanced.

Q. When was it returned to the plaintiff?

A. May 19th, 1884.

Q. State the balance in the Marine Bank on the 6th of May, 1884,

at 9 o'clock a. m., not including the draft on Boston, as per account kept in your books.

A. $117,981.72.

Q. Were any checks drawn by the plaintiff on that bank on the 6th day of May, 1884?

A. Yes.

Q. Were any of said checks paid by the Marine Bank?

A. No.

Q. Did the plaintiff, after May 6th, 1884, redeem any checks which were drawn by the plaintiff on the Marine Bank prior to May 6th, 1884, and which the said bank did not pay? If so, state the amount.

A. Yes; $1,996.

Q. Did plaintiff have any arrangement or understanding with the Marine Bank in regard to plaintiff's drawing against this draft?

A. None to my knowledge.

Q. Did the plaintiff ever have any arrangement or understanding with the Marine Bank in regard to plaintiff's being allowed to draw against any out-of-town paper before its actual collection?

21 A. None to my knowledge.

Q. Did the plaintiff ever draw on the Marine Bank against any out-of-town paper before its actual collection?

A. No.

Q. Do you know of any arrangement or understanding or dealing with the Marine Bank by which the plaintiff was authorized or entitled to draw against the draft in suit before its actual collection?

A. No.

Q. You drew some checks on the 6th of May, 1884, before you knew the Marine Bank failed?

A. Yes; and took them all up again.

Q. What was the amount of the checks you drew on the 6th of May?

A. $3,894.

Further hearing adjourned to Monday, February 16th, 1885, at 3 o'clock p. m.

Adjourned to Wednesday, February 18th, 1885, at three o'clock p. m.

Adjourned to Tuesday, February 24th, 1885, at three o'clock.

Adjourned to Thursday, February 26th, 1885, at three o'clock.

22 FEBRUARY 26TH, 1885.

Parties met pursuant to adjournment.

Present: John E. Burrill, Esq., for plaintiff; John E. Develin, Esq., for defendant.

THOMAS W. LILLIE, recalled and cross-examined by Mr. DEVELIN, testified as follows:

Q. In your direct examination the other day you stated that the pass-book of the plaintiffs was at the Marine Bank at the time of the deposit of this draft?

A. Yes; it was there.

Q. How often were the plaintiffs in the habit of sending their pass-book down to the bank to be written up—monthly or semi-monthly?

A. At no stated periods; irregularly.

Q. But frequently?

A. Oh, yes; quite frequently.

Q. Mr. Lillie, in answer to a question of Mr. Burrill's, whether or not the plaintiffs in this action ever drew against this draft in suit, you answered, "No, sir." You meant by that that there was no specific draft drawn on the bank as against that specific sum? You do not mean that if that was in gross with other sums on deposit that you did not draw against that gross sum?

Objected to by plaintiff's counsel.

A. I mean that I drew on the funds which I knew we had in the bank exclusive of that sum.

Q. You drew on your deposit in the bank?

A. Yes, sir.

Q. And whether this draft was included in the sum or not, you drew against that sum if it was included in it?

A. Yes, sir; if the bank had included it.

On hearing the last question and answer read over to him the witness states, "I can hardly say that."

23 Q. Mr. Lillie, when you answered "No" to the question of Mr. Burrill as to whether the plaintiffs had drawn against that specific draft or its amount, you did not mean to be understood as saying that in no case you ever drew against specific amounts on deposit in your general deposit in the bank, did you?

A. No, sir.

Q. You do not mean by that answer to say that you did not draw against any gross balance in your bank, including the amount of this draft?

A. I do not mean to say that.

Q. Then do you mean to say that when you drew checks on the Marine Bank you had in your mind or in your check-book or some memorandum to give the amount of this draft as not included in your balance in the bank?

A. No, sir; I don't say that.

Q. Then you drew against your balance in the bank, whatever it was?

A. Yes, sir.

Q. You have testified that you drew drafts or checks, or the plaintiffs did, on the Marine Bank, on the 5th of May, 1884, and on the 6th of May, 1884?

A. Yes, sir.

Q. Were not those checks drawn against your gross balance in the bank?

A. Yes, sir.

Q. Do you know, Mr. Lillie, at what hour this deposit was made—what hour of the day?

A. Personally, I do not.

Q. Do you remember the time the boy left the office to go to the bank?

A. On the 5th of May, with the draft?

Q. Yes?

A. No, sir; I do not.

Q. You cannot tell whether it was in the forenoon or the afternoon?

A. I have satisfied myself by inquiry that it was in the forenoon.

Q. When you drew the checks on the 5th of May, 1884, can you tell at what hour you drew the last one?

24 A. No, sir; I could not.

Q. Did you draw it at half past two?

A. I don't believe any one can tell that; there is no record of the hour.

Q. Can you tell at all with relation to the time when the messenger took the draft to deposit and the time you drew any check on the 5th of May?

A. No, sir.

Q. Have you an impression that amounts to a recollection?

A. I have an idea that at that time we were drawing checks constantly all day.

Q. Up to three o'clock?

A. Yes, sir.

Q. You stated in your direct examination that there was no arrangement or understanding with the defendant's bank in regard to allowing the plaintiffs to draw against this draft before its actual collection. Do you mean by that that there was no written or verbal arrangement?

A. That is what I mean.

Q. And that is all you mean?

A. Yes, sir.

Q. A similar question was asked with regard to any out-of-town paper, and you answered "No." Do you mean by that that there was no written or verbal arrangement?

A. That is what I mean.

Q. To the question "Did the plaintiff ever draw against out-of-town paper before its actual collection?" your answer is "No." Mr. Lillie, can you remember when and how many drafts or checks were deposited by you, drawn on out-of-town banks or parties, during the years 1884 and 1883?

A. I know that there were very few, if any.

Q. Were there any at all?

A. I have no recollection of any.

Q. You don't recollect of any in 1884 or 1883?

A. No, sir.

Q. Then when you answered that you never drew against

25 drafts or checks drawn on outside parties outside the city until collected, you did not refer to any deposits of that character made in 1883 or 1884?

A. I cannot say that; but, to the best of my knowledge and belief,

we never in those years, or during any year of my experience with the company, had occasion to draw or did draw against such drafts or checks before collection.

Q. Was there any deposit during those years of that character except this draft in suit?

A. As I think I stated, few, if any; and very unimportant amounts, if any.

Q. Were there any?

A. I cannot say positively that there were none.

Q. When you say that you never drew against any uncollected checks or drafts on parties outside the city before collection your answer really has no application to any particular case?

A. No, sir; no application.

Q. For the reason that there were none such; or, if any, they were very small amounts?

A. That is about it.

Q. You also answered, "No, sir," to a question of Mr. Berrill's in substance this: "Do you know of any arrangement or understanding or dealing with the defandant's bank by which the plaintiff was authorized or entitled to draw against this draft in controversy before its actual collection; you meant by that that you did not know of any arrangement, understanding, or dealing, in writing or verbal?"

A. Yes, sir.

Q. Then, when you answered in regard to the word dealing, did you intend to be understood that there were no dealings of that kind at all with the bank from which any such arrrangement could be implied?

A. Yes, sir.

Q. You had none, as you answered before, of that character?

A. No, sir; none.

Adjourned to March 12, 1885, at 3 o'clock.
26 Adjourned to March 16, 1885, at 3 o'clock.
Adjourned to March 18, 1885, at 3 o'clock.
Adjourned to March 20, 1885, at 3 o'clock,
Adjourned to March 24, 1885, at 3 o'clock.
Adjourned to March 27, 1885, at 3 o'clock.

NEW YORK, *March* 27, 1885.

Parties met pursuant to adjournment.

Present: John E. Burrill, Esq., for plaintiff; John E. Develin, Esq., for defendant.

GEORGE BUTLER recalled and cross-examined br Mr. DEVELIN:

1 Q. You say on your direct examination that when you gave the draft in suit to the messenger to deposit, the instructions you gave him were merely to take it to the Marine Bank. Can you give the exact words of these instructions? If so, give them?

A. I cannot. I can qualify that, if you like. I gave him the

deposit ticket with the draft in it and told him to take it to the bank.

2 Q. Had not this same messenger boy (colored) taken, on occasions previous to the 5th of May, 1884, by your instructions, specie, bills, checks, drafts, or bills of exchange to the Marine Bank
27 to deposit on behalf of the plaintiff in this action; if so, how often, according to your best recollection?

A. Almost daily for about two years; it may be longer.

3 Q. State if the instructions you gave this messenger boy on the 5th of May, 1884, when he received the draft in question to deposit, were not substantially the same as the instructions you gave him on the other occasions when he was sent to make deposits of checks on New York city banks or of bank bills or specie?

A. I gave him no special instructions. I sent him down, and being a colored boy, I gave him no instructions.

4 Q. I want to know whether you gave him on previous occasions any other instructions than you gave him on the day you sent the draft?

A. I cannot remember. It may have been I told him this was for collection, or I may not; I cannot swear.

5 Q. Mr. Lillie, on his cross-examination in this case, testified that, excepting the draft in suit, there were few, if any, out-of-town drafts or checks for collection deposited in the Marine Bank during the years 1883 and 1884 by the plaintiff, and, if any, they were of very unimportant amounts; does your recollection agree with Mr. Lillie's in this regard?

A. Substantially the same.

6 Q. When, then, on your direct examination to the question: 'Did the plaintiffs ever draw on the Marine Bank against any out-of-town paper before its actual collection?" you answered "No," you meant that the plaintiff never so drew, because there was no such out-of-town paper in the Marine Bank to draw against; is not that your entire meaning in your said answer to the aforesaid question on your direct examination?

A. My answer to that would be that it was not necessary. We kept a balance there, without regard to the collection of any paper, and we should not draw against that paper until we knew it was paid, or we would get notice that it was paid.

7 Q. There was no such paper?

A. There was in this case.

28 (Question numbered 6 repeated.)

A. I don't think we ever did. I cannot remember.

8 Q. That is not an answer to my question. There was no paper there to draw against, and that was the reason you never drew against out-of-town paper, because there was no such paper to draw against; is not that it?

A. We drew on anything we had; we didn't draw on anything we didn't have.

9 Q. If not, then was there ever, previous to the deposit of the draft in suit, any out-of-town paper deposited by the plaintiff with the Marine Bank; if so how often?

A. Not often.

10 Q. When?

A. Perhaps two or three times a year.

11 Q. And what were the several amounts; and was there at the time of their deposit, or at any other time, any verbal or written understanding between the plaintiffs and the Marine Bank that the plaintiffs should or should not draw against such out-of-town paper until collected. If so, state it.

A. I cannot give the several amounts.

12 Q. Were they large?

A. Not very large, I should say.

13 Q. Was there any understanding, one way or the other, about drawing against out-of-town papers between the plaintiffs and the Marine Bank?

A. I don't know of any understanding.

14 Q. Do you know of any arrangement or understanding or dealing with the Marine Bank by which the plaintiff was not authorized or not entitled to draw against the draft in suit until its actual collection?

A. I don't know of any.

15 Q. Was there not a total absence of any arrangement, understanding, or dealing with the Marine Bank by which, so far as you know, the plaintiff was not authorized or entitled to draw against the said draft before its actual collection?

A. I don't know of any arrangement any further than this,
29 that if I put paper there for collection I was not to draw against it until I knew it was actually to our credit and had been paid and collected.

16 Q. What do you mean in your answer by saying that you were not to draw against it until collected?

A. That is my understanding of the arrangement, so far as the depositing of paper is concerned.

17 Q. That is your own understanding?

A. That is my own understanding.

18 Q. You did not know of any arrangement with the bank?

A. No; that is my own understanding.

19 Q. Was there not a total absence of any arrangement or understanding or dealing upon the subject?

A. As far as I know, I don't think there was any.

20 Q. Were you not aware, in 1884, previous to the 6th of May in that year, that it was the custom or mode of business of many New York banks, including the Marine Bank, to distinguish between out-of-town paper which was deposited and received with privilege to be drawn against at any time and such paper not to be drawn against until collected, and that there were separate tellers and officers to receive such deposits as cash deposits or as collection paper?

A. I was not aware that there was any such arrangement.

21 Q. Did the plaintiffs have more than one pass-book at a time in which their deposits in the Marine Bank were entered?

A. Two pass-books. One was to deposit money to pay dividends, and the other was to receive all our other deposits. The dividend

pass-books contained nothing but money deposited to meet payment of dividends, and we drew different kinds of checks for dividends.

22 Q. Was there anything in the entry in this pass-book showing the deposit of out-of-town paper for collection different from the entries of cash, town checks, or drafts? If so, produce the same.

A. There was nothing different.

Witness produces general deposit book.

30 23 Q. This is the pass-book in which your general deposits were made?

A. Everything except for dividends.

Defendant's counsel offers in evidence from general deposit book the following:

" 1884.					
" April 1	Balance	$111,603			
" " 2		93,516 66			
" " 5	C	30,050			
" " 10	R	18,930			
" " 11	R	20,025			
" " 12	C	30,060			
" " 14	R	726 37			
" " 21	R	50,004 19			
" " 25	C	30,000			
" April 28	1884, C	30,000	112 vouchers forw.	From check list	$118,929 50
				Balance	295,985 72
		$414,915 22			$414,915 22
" May 1	Balance	$295,985 72	265 vouchers forw.	From check list	$176,092 00
" " 5		17,835		Balance	137,728 72
		$313,820 72			$313,820 72
" May 7	Balance	$137,728 72			
" June 13	Int. to $\frac{5}{6}$	790		Balance	$138,518 72
		$138,518 72			$138,518 72
" June 13	Balance	$138,518 72			
	Papers prepared.				

24 Q. Mr. Butler, I see in this pass-book, under date of May 5th, 1884, a deposit of $17,835; is that the draft in suit?

A. That is the amount—yes, I think it is.

25 Q. That is the deposit of the draft in suit?

A. Yes.

Redirect examination by Mr. BURRILL:

26 Q. You testified on your direct examination that when you sent this draft down to the bank the pass-book was down there?

31 A. I don't deny it now.

27 Q. It was down there?

A. I am certain of it.

28 Q. You also testified that you did not get it from the bank until after the receiver was appointed?

A. That is so.

29 Q. Then you could not have sent the pass-book down to the bank with the boy when you sent this draft?

A. No.

30 Q. And you did not mean to be understood, on your cross-examination, that you sent the pass-book with the draft to the bank?

A. No, sir.

Cross-examination by Mr. DEVELIN:

31 Q. Please look through this pass-book, beginning May 5th, 1883, and see if you can find any entry of out-of-town paper to be collected? If so, point it out to me.

A. (The witness points out, under date of July 13, 1883, an entry with the words "coll. (int.)," and then the figures "821.44" in a line with the entries of other deposits made, but witness says he does not know what it is.)

32 Q. Is there any difference, except as to dates and figures, in the entry in this pass-book of that deposit on 13th July, 1883, $821.44, from other entries of deposits, except the words "coll." and "int.?"

A. That is all.

By Mr. BURRILL:

Q. Tell Mr. Develin when you got this pass-book back from the bank.

A. May 19, 1884.

Adjourned to April 3d, 1885, at 3 o'clock.
Adjourned to April 7, 1885, at 3 o'clock.
Adjourned to April 9, 1885, at 3 o'clock.

32 NEW YORK, *April 9th*, 1885.

Parties met pursuant to adjournment.

Present: J. E. Burrill, Esq., for plaintiff; J. E. Develin, Esq., for defendant.

WILLIAM I. BROOKS, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. DEVELIN:

Q. What is your name?

A. William I. Brooks.

Q. You reside in the city of New York, or you do business in the city of New York?

A. I do business in the city of New York and reside in Brooklyn.

Q. Were you connected with the Marine Bank in May, 1884?

A. Yes, sir.

Q. What was your position there?

A. Part of the time I was assistant to the receiving teller and part of the time assistant to the note teller.

Q. By receiving teller you mean the teller that received deposits?
A. Yes, sir.
Q. Were you acting as assistant receiving teller on the 5th of May, 1884?
A. I think I was.
Q. You received on that day deposits, did you?
A. I did not receive deposits. I made the entries in the book of deposits.
Q. Received by the receiving teller?
A. Yes, sir.
Q. Were they received in your presence and handed by him to you?
A. No, sir; not usually.
Q. On this occasion, on the 5th of May?
A. No, sir.
33 Q. What did you do when you assisted him?
A. After he had received the deposits I took the ticket, entered it in the book, and gave it to the book-keepers.
Q. Entered it in a book?
A. Yes, sir.
Q. Was that the first entry that was made of the deposit?
A. After the pass-book, yes.
Q. The deposit ticket and the matter deposited were handed to you, or only the ticket?
A. Only the ticket.
Q. And that was handed to you by the receiving teller?
A. Yes, sir.
Q. Look at the book now shown you endorsed, "Credit Book of Dealers No. 40, Marine National Bank," and state if that is the book in which you made the entries from the deposit tickets handed to you by the deposit receiving teller.

Book shown witness.

A. Yes, sir.
Q. Look under the head of the fifth of May and state who made the entries under that date.
A. I made all the entries on the 5th of May in this book.
Q. See if there is an entry of a deposit by the plaintiff, The St. Louis and San Francisco Railway Company, on that day.

Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant.

A. Yes, sir.
Q. What is the amount?
A. $17,835.
Q. Read the entry.
A. St. Louis and San Francisco Railway Company, $17,835.
34 Q. There are numerous entries preceding and succeeding that entry?
A. To the same account?

Q. I mean in the entries of that day?
A. Yes, sir.
Q. Does that book represent deposits of cash or checks received as cash?

Like objection by plaintiff's counsel.

A. Deposits of cash, checks or money, or both. This column (indicating) represents the money and that represents the checks or drafts, whatever it may be, but received as cash.
Q. Was there any other book kept in the bank in which entries were made of drafts or notes that were deposited for collection?

Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant.

A. Yes, sir.
Q. You had charge, at times, of that book?
A. No, sir.
Q. But you knew the fact that there was such a book?
A. Yes, sir.
Q. Were there ever any entries made, so far as your knowledge extends, in this book of notes or drafts or bills of exchange deposited for collection?

Like objection by plaintiff's counsel, and also on the ground that the witness is not shown to have any knowledge on the subject.
Question waived.

Q. Do you know whether or not, from your experience in the bank, there were different sets of books, or a different set of books, kept for entries of deposits of money or checks or drafts re-
35 ceived as cash, and other books in which were entered bills of exchange, drafts, or notes for collection?

Like objection by plaintiff's counsel.

A. All drafts or notes for collection were entered in a different book from this book.
Q. And that you know?
A. Yes, sir.
Q. In what book were entries made of cash and checks and drafts and bills of exchange deposited and received as cash, and in what book were drafts, bills of exchange or notes for collection entered in the year 1884?

Like objection by plaintiff's counsel.

A. All deposits of drafts, checks or cash deposited as cash were entered in this book and those for collection were entered in a book kept by the note teller, with which I had nothing to do.
Q. Different from this book?
A. Yes, sir.
Q. But you knew of such book and such entries?
A. Yes, sir.

Cross-examination by Mr. BURRILL:

Q. Who was receiving teller on the 5th of May, 1884?
A. John H. Carr.
Q. How many assistants did he have on that day?
A. I think he had either four or five; I cannot tell exactly.
Q. Did he have four or five every day?
A. It was usual for him to have about that many.
Q. Did anybody receive the deposits except himself?
A. Do you mean on that day?
Q. On that day.
A. I could not recollect especially about that day, sir.
36 Q. Was it his usual custom to receive all deposits himself?
A. When he was on duty; but sometimes he was out for a short time.
Q. Can you tell by any entry in this book or otherwise whether he was on duty that day?
A. No, sir.
Q. If he were not on duty on that day who would receive the deposits, according to the ordinary custom of doing business?
A. Mr. Rossell or Mr. James Oliver, Jr. I think they were the only two who ever received deposits in his absence. Oh, yes, and sometimes the note teller, Mr. H. E. Street. I think those are his initials.
Q. Who was Street, the note teller?
A. Yes, sir.
Q. Have you any recollection now as to whether Mr. Carr was acting as receiving teller and receiving deposits on the 5th of May, 1884?
A. My recollection is that he was.
Q. And if he was, no other person would, according to the ordinary course of business, receive deposits but himself, if he were present?
A. No, sir.
Q. In this book which you have here (referring to "Credit Book of Dealers No. 40"), how many pages are devoted to the entries on the 5th of May, 1884?
A. I think three pages.
Q. Look and see.
(Witness examines book.)
A. Three pages.
Q. The entries here are divided alphabetically, on the first page extending from "A" to "F?"
A. Yes, sir.
Q. On the second page from "G" to "N?"
A. Yes, sir.
Q. And on the third page from "O" to "Z?"
A. Yes, sir.
Q. And you made the entries at the time on these various pages according to the initial letter of the party making the deposit?
A. Yes, sir.

37 Q. When you made the entry of the deposit you had nothing but the ticket to make it from?

A. No, sir.

Q. You had nothing to do with passing upon the question whether the amount entered on the ticket was good, bad, or indifferent?

A. No, sir.

Q. Every ticket that was handed over to you you entered the amount of it in the deposit book to the credit of the party whose name was on the ticket?

A. Yes, sir.

Q. And that was all you had to do with it?

A. Yes, sir.

Q. You had no business to receive moneys for deposit or to give credit on the books for it?

A. No, sir.

Q. And you had no directions except what the ticket gave you?

A. No, sir.

Q. You had no conversation with the receiving teller as to what you had to do?

A. No, sir.

Q. Where did you get the ticket?

A. The receiving teller, when he got through with the ticket and checked off the items, put it on a pin or hook on his desk, and I took and entered them and passed them over to the book-keepers.

Q. You had nothing to do with the record of collections?

A. No, sir.

Q. The note teller was the man for that?

A. I had nothing to do with them. I have entered, sometimes, collections that were handed in, into the pass-books.

Q. You mean to say you have made an entry of amounts received for collection in pass-books?

A. I have done so sometimes.

Q. Under what circumstances did you do that?

38 A. If a party doing business with the bank would hand in a draft with his pass-book I would enter it and give him back the book and hand the draft over to the note teller.

Q. That was while you were at the receiving teller's desk?

A. No, sir; the note teller's desk.

Q. That was in the discharge of your duties as assistant to the note teller?

A. Yes, sir.

Q. When entries were made in the books which you say contained the records of securities received by the note teller, from what were those entries made when you made them?

A. From the draft or check, or whatever it might be.

Q. From the security itself?

A. Yes, sir.

Q. With the pass-book?

A. Yes, sir.

Q. And where would you enter those in the books?

A. Sometimes the dealer would have a separate book and sometimes in the back part of his regular deposit books.

Q. Sometimes in a separate book for collections and sometimes in the back part of his ordinary pass-book?

A. Yes, sir.

Q. And sometimes in the ordinary entries in the pass-book?

A. No, sir.

Q. All the notes which went through the note teller's hands went there necessarily for collection; they could not go there for any other purpose, could they?

A. All the notes that went to him?

Q. Yes.

A. There might be notes for discount, perhaps.

Q. Aside from the notes which were given to him for discount all notes which went into his hands went there for collection?

A. I presume so; I don't know of any other reason.

Q. Do you know of any other purpose for which they went there?

39 A. No, sir.

Q. When they were given to him for discount what was done with them?

A. I don't know.

Q. Are you sure that he received notes presented there for discount?

A. I don't know; I suppose so.

Q. Do you know that notes when presented for discount are sealed up and do not pass through the clerks of the bank?

A. I don't know.

Q. According to the ordinary course of business in that bank on the 5th of May, if the customer sent his pass-book to the bank with money or checks or drafts the entry would be made in the pass-book, would it not?

A. Yes.

Q. In case of the receiving teller, would it be made by himself?

A. Yes; not always; but, of course, it might be by his assistant acting for him, and I know there were cases occasionally where a deposit had been made and a customer had not his book with him, and when the book would be left to be balanced the book-keeper would enter that deposit in the pass-book from the entry on his book.

Q. According to the ordinary course of business in that bank on the 5th of May, if the customer sent his pass-book to the bank with money or checks or drafts the entry would be made in the pass-book, would it not?

A. Yes, sir.

Q. It would be made by the receiving teller or the party acting for him in receiving it?

A. Yes, sir.

Q. Who was the book-keeper of the bank in its employ on the 5th of May, who kept the account of the St. Louis and San Franciso Railway Company?

A. There were three book-keepers there, but which one kept it I don't know, because they were in the habit of changing.

40 Q. There were three book-keepers who kept the accounts of the dealers according to the initials of the customers' names?

A. Yes, sir.

Q. Who were they?

A. George W. Force, Mr. Culver—I don't remember his initials—and there was a Mr. somebody whose name commenced with a "G."

Q. Look at the pass-book now shown you, being the pass-book of the plaintiff with the Marine National Bank, and look at the entries commencing April 1st, 1884, and extending to April 25th, 1884, inclusive, and state in whose handwriting are the figures and entries therein made.

(Pass-book handed witness.)

A. The word "bal." and the figures "111,603" I don't know; they were made by one of the bookkeepers. The second entry, "2—93, 516.66," I cannot tell in whose handwriting it is. The entry "5, C. 30,050" is in Mr. Carr's handwriting. The entry "10, R. 18,930," and the entry "11 R. 20,025," and the entry "14, R. 726.37," and the entry "21, R. 50,004.19" are in Rossell's handwriting. The entries "12, C. 30,060" and "25, C. 30,000" are in Mr. Carr's handwriting, and the entry on the next page, "Apl. 28, 1884, C. 30,000" is in Mr. Carr's handwriting.

Q. Look at all the succeeding entries in that pass-book and, excluding the pencil marks, state, if you know, in whose handwriting the same are.

A. I think all those excepting the words "papers prepared," in red ink, and also excepting the entry "June 13, int. to $\frac{5}{6}$ 790," are in the handwriting of George W. Force.

Q. You don't know in whose handwriting the entries "paper prepared," in red ink, and "June 13, int. to $\frac{5}{6}$ 790" are?

A. No, sir.

Q. Who was George W. Force?

A. He was one of the three book-keepers.

Q. Had he anything to do in the ordinary course of business, with making original entries in the pass-books—the depositors's pass-books?

41 A. No; I presume if there had been an entry omitted or a deposit made when the pass-book was not at the bank, when the pass-book was left to be balanced, and he discovered the entry, he would make it.

Q. From what?

A. His book.

Q. Aside from that, he had nothing to do with making any entries in the pass-book?

A. In balancing the book.

Q. Had he anything to do with making entries of deposits in the pass-book, aside from what you have already stated?

A. No, sir.

Q. That is, when an entry of a deposit may have been omitted in

the pass-book, he would make that entryi n the pass-book when he discovered it from his own book, and that was all?

A. Yes, sir.

Q. And under no other circumstances?

A. No; not that I know of.

Q. How did the book-keeper, in the ordinary course of business, balance the book?

A. He or his assistant would write in from the vouchers, then he would compare it with his ledger and balance it?

Q. What do you mean by vouchers?

A. Checks.

Q. Those were entered from the vouchers themselves?

A. Yes, sir.

Q. In the pass-book?

A. Yes, sir.

Q. You will find in here (referring to pass-book) that Mr. Force made the balance of this book on the 1st of May, did not he?

A. Yes, sir.

Q. The entry "May 1, balance, $295,985.72," is in his handwriting?

A. Yes, sir.

Q. Then the entry "5, 17,835" in that entry, there is no initial to indicate by whom it was made, is there?

42 A. No, sir.

Q. What would you gather from that?

A. That the book-keeper made that entry when he balanced the book.

Redirect examination by Mr. DEVELIN:

Q. From what did Mr. Force get the information by which he made the entries in his book?

A. In his ledger.

Q. In his ledger?

A. He entered deposits from the tickets which I had already entered on the "Credit Book."

Q. The book you have already testified to?

A. Yes, sir.

Q. And from those deposit tickets he made the entries in his ledger?

A. Yes, sir.

Q. Did Mr. Carr receive when he was on duty cash and drafts and bills of exchange, &c., deposited as cash, and notes deposited for collection, or did some other officer of the bank receive the notes deposited for collection?

A. They were received by another officer.

Q. That was the custom of the bank?

A. Yes, sir.

Q. That entry which you made in the credit book, in regard to which you have testified, of "17,835," was made by you from an original ticket of deposit?

A. Yes, sir.

Q. And when Mr. Carr was not on duty did any other person who was on duty, in his absence, as receiving teller receive any drafts or bills of exchange or notes for collection?
A. No, sir; it was not their duty.
Q. And did not do it?
A. No, sir; it was not their duty.
Q. Not to your knowledge?
A. No, sir.

43 Recross-examination by Mr. BURRILL:

Q. The book-keeper, Mr. Force, made his entry in his ledger from the same deposit ticket from which you made the entry in this "Credit Book No. 40?"
A. Yes, sir.

Adjourned to Thursday, April 16, 1885, at 3 o'clock p. m.
Adjourned to April 20, 1885, at 3 o'clock p. m.
Adjourned to April 22, 1885, at 3 o'clock p. m.

APRIL 22, 1885.

Parties met pursuant to adjournment.
Present: Mr. J. E. Burrill, for plaintiff.

A representative of Messrs. Develin & Miller appeared for defendant and applied for a further adjournment.
After hearing the respective parties the examiner ordered that the examination proceed on Friday, April 24, 1885, at 3 o'clock.
Adjourned to April 27th, 1885, at 3 o'clock p. m.

44 APRIL 27, 1885.

Parties met pursuant to adjournment.

Present: J. E. Burrill, Esq., for plaintiff; J. E. Develin, Esq., for defendant.

JOHN H. CARR, a witness called on behalf of defendant, being duly sworn, testified as follows:

Direct examination by Mr. DEVLIN:

Q. What is your name?
A. John H. Carr.
Q. Where do you reside?
A. In Brooklyn.
Q. During the years 1883 and 1884, up to the 6th of May, 1884, were you employed in the city of New York?
A. I was.
Q. In what capacity, and where?
A. As receiving teller of the Marine National Bank of the city of New York.
Q. Look at the paper I show you and tell me what that is.

(Paper shown witness.)

A. This is a deposit ticket.
Q. What is the paper.

A. It is a deposit ticket of the St. Louis and San Francisco Railway Co., made in the Marine National Bank, November 3d, 1883. (Ticket marked Ex. C., April 27, '85, O. F.)

Q. What is the amount?

A. The total amount is $17,860.

Q. How many items is that composed of?

A. Two.

Q. Give them.

A. One of them is $17,835, the other $25.

Q. What was the form or shape of this amount of $17,835?

Objected to by plaintiff's counsel as immaterial, irrelevant, and incompetent.

45 A. That was a check that was drawn on a bank outside the city of New York.

Q. Do you remember, either by reference to that ticket or independently, of that deposit?

A. I think I can safely say I remember of this deposit.

Q. As being on a foreign bank?

A. Yes; I know that to be a fact.

Q. Did it go out to the party on whom it was drawn?

A. Of my own knowledge, I cannot say, sir; I do not know of my own knowledge.

Q. What was the course of business in the Marine Bank if it was a foreign draft?

Objected to by plaintiff's counsel as before.

A. The course of business would be for me, as receiving teller, to hand it to the note teller or his assistant for the purpose of having it sent to the bank on which it was drawn.

Q. Now, I show you the pass-book or bank book of the plaintiff with the Marine National Bank, under date of November 3, 1883. Read the entry. (Book handed to witness.)

A. The entry there is "November 3, 1883, $17,860."

Q. Is that the same deposit which is mentioned in that ticket?

A. That is the same deposit mentioned in the ticket.

Q. And it is entered in that book as a cash deposit?

Objected to by plaintiff's counsel. Question withdrawn.

Q. What character of deposit was that entry, so far as the entry is concerned?

Objected to by plaintiff's counsel as immaterial, irrelevant, and incompetent.

46 A. The entry would indicate to us that this amount of money went directly to the credit of the company as a cash item.

Q. Who were your assistants as receiving teller?

A. Within a year of the time of the bank's failure my assistant was Wilbur F. Rossell; he was my assistant and took my desk during my absence.

Q. Were any deposits, according to the course of business and dealing of the bank or under your instructions, received by you, except such as were cash or taken as equivalent for cash?

Like objection by plaintiff's counsel.

A. There was nothing taken at my desk that was not a cash item—that is, everything that was received by me as receiving teller was cash.

Cross-examination by Mr. BURRILL:

Q. Do you wish to be understood as saying that you have a distinct recollection independently, of any entry on the ticket or any entry in the pass-book, that the item of "$17,835" referred to by you was a draft drawn on a bank out of the city?

A. I know, Mr. Burrill, by my mark, made at the time that I took the deposit. I made a mark on the ticket which indicates very clearly to me, or to any one in the bank what it was.

Q. Look at the ticket and tell me what there is on it to indicate that it was a draft drawn on a bank out of the city. (Ticket dated November 3, 1883, shown witness.)

A. My mark there of an "F," in red pencil, on the face of the ticket, which I did with all foreign items.

Counsel for the defendant produces on the call of counsel for plaintiff the original deposit ticket of May 5th, 1884.

47 Q. Is there any part of that ticket in your handwriting. (Deposit ticket of May 5, 1884, shown witness.)

A. There is not, sir. (Ticket marked Exhibit B, Apr. 27, 1885, O, F.)

Q. Was it always your habit, whenever a draft or a check on a bank outside of the city of New York was received at your desk, to put on it the letter "F?"

A. It was not universally so, but nearly always so when it was a large amount.

Q. When it was a large amount?

A. Yes. I used sometimes to mark every item on the ticket.

Q. Was it your general rule to mark every item of that description with the letter "F?"

A. Was it my general rule?

Q. Yes.

A. My general rule was to mark every large foreign item with the letter "F."

Q. What was the object of that?

A. So in case after a deposit had been taken, that if any of the officers should ask what certain checks consisted of—if a large deposit—we would be able to tell. Sometimes a man would want to draw a large amount after he had deposited a large amount, and we would want to be prepared to tell the officers what the deposit consisted of.

Q. Until they knew it had been collected?

A. I don't know what they might want to know about it, but in

case they wanted to know what the deposit consisted of I could tell them; this would refresh my memory.

Q. Who would ask you what the items of deposit were?

A. Some of the officers.

Q. What officers?

A. Officers of the bank; the president or cashier.

Q. What would the president or cashier want to know of what items deposited consisted when you had entered them as cash to the credit of the depositor?

Objected to by defendant's counsel as immaterial, irrelevant, and incompetent.

48 A. I couldn't say.

Q. Did they ever tell you what they wanted to know for?

A. I don't recall.

Q. Did you ever ask them?

A. No, sir.

Q. Do you recollect any occasion on which they did ask you?

A. I don't recall any now.

Q. For what reason did you want to know of what an item consisted when you had passed it as cash to the credit of the depositor?

A. Because sometimes it was necessary, if we had a difference in cash, to take up every amount, and if I found a mark on the ticket it would aid me very much in finding the check.

Q. Why did putting a mark on that ticket indicate to you where to find the check?

A. Because all foreign checks were entered on the foreign and general office slip, and I would not list them among the exchanges, but on the foreign slip.

Q. You did keep a slip containing entries of drafts or checks on banks out of the city?

A. Yes, sir.

Q. It was your custom to receive at your window drafts drawn on banks or persons out of the city?

A. Yes, sir.

Q. How frequently in the course of the day did drafts drawn on banks or people out of the city come to your desk?

A. Very frequently.

Q. How many times a day?

A. Sometimes eighty or one hundred times.

Q. Did you always enter them on one slip?

A. One slip.

Q. What did you call that slip?

A. "Foreign and general office slip."

Q. Were they regular printed slips?

A. Yes, sir.

Q. Where was that slip kept during the day, while you were at your desk?

49 A. It was kept in the pigeon-hole with the foreign checks.

Q. How long did you keep that slip there?

A. I kept it every day; it was part of my proof of my cash.

Q. Proof of your cash?

A. Part of that. All checks I had taken in had to be listed; those foreign checks were listed on that slip.

Q. Did you give that slip to any one?

A. No, sir; I kept it.

Q. Was there any entry ever made from it?

A. Never, except my entry of the total in the proof book.

Q. Nobody else ever entered anything from that slip?

A. No, sir; it was part of my own work; nobody else had anything to do with it.

Q. The objects, if any, in making the letter "F" on these checks or drafts on banks or persons out of the city were for the purpose of enabling you to ascertain what the items were and also for the purpose of enabling you to answer any inquiries the officers of the bank might make in regard to them?

A. Yes, sir.

Q. When you received a deposit what was the first entry you made of it?

A. In the pass-book.

Q. Suppose you had not the pass-book—suppose it was not there?

A. I would make none; but the first would be made by the credit clerk in the credit book.

Q. What would you do if you had not the pass-book and a deposit was made and a ticket was handed you?

A. I would see that the amount of the deposit agreed with the amount of the ticket, tick it off with a red pencil, and put the ticket on a spindle on my desk.

Q. And in case of a foreign draft mark it with a letter "F?"

A. Yes, sir.

Q. Well, what next?

A. The ticket was then taken by the credit clerk and entered in the credit book.

50 Q. Well?

A. After that the book-keeper who kept the ledger would come to my desk and take the tickets. There were three ledgers and a book-keeper for each ledger, and the book-keepers would come and take the tickets away,

Q. The book-keeper had nothing to do with the credit book?

A. No, sir; the credit clerk did that.

Q. And that was kept in your department?

A. It was.

Q. And the book-keepers made their entries from the deposit tickets?

A. Yes, sir.

Q. Some time back, in your testimony, you stated that one object of your marking the items on the deposit ticket with the letter "F" was to enable you to answer questions, in case any arose, in regard to the right of the depositor to draw against it?

A. Yes.

Q. Give us an instance of that.

A. I don't recall any particular one; the matter was left usually

to my judgment. There was rarely any case came up; I don't recall any just now.

Q. Do you wish to be understood as saying that you had discretion as to receiving checks or drafts on out-of-town banks as cash or for collection?

A. To a certain extent.

Q. What was the extent?

A. The extent would be that if it was not an extraordinarily large check I would take it without submitting it to an officer of the bank.

Q. You testified, did you not, that the course of business was that foreign checks or drafts always went for collection to the note teller?

A. After they came to me first.

Q. In the first instance?

A. Yes, sir. They never went to the note teller unless they were left for collection.

Q. Have you not already testified that in all cases drafts
51 on banks or individuals outside of the city went in the first instance to the note teller or collection clerk?

A. I don't think I stated that. It is not my recollection of the statement.

Q. How frequently did they come to you?

A. They always came to me every day.

Q. Then when you received one of these drafts on a foreign bank or person residing out of the city to whom did you give the draft?

A. I gave it over to the note teller or his assistant to send away. I gave it to one or other of these.

Q. What was the title of that note teller?

A. That was his title.

Q. Note teller?

A. Note teller.

Q. Did you make any entry in your book that you gave him such a security?

A. Not on the book. I made it on the foreign slip that I spoke about.

Q. What was on the foreign slip, as you call it, to indicate that you had handed the security over to the note teller?

A. A pencil mark run through it.

Q. Was there anything put by you on the foreign slip, as you call it, to indicate what disposition you had made of the draft?

A. It would be indicated to me by my own mark.

Q. What mark?

A. A little check mark to show that the amount had been compared.

Q. How do you mean?

A. The note teller's assistant would come for the large foreign checks and he would call them off, and I would see that I had entered them correctly and I made this check mark.

Q. You yourself had nothing to do with the collection of these foreign drafts or foreign checks?

A. No, sir.

Q. Did you receive notes in the same way in which you received drafts or checks?

52 A. No, sir; a certified note I would, but notes not certified I would not.

Q. You mean a note payable at another bank which was certified to be good?

A. Yes; certified the day it was due.

Q. And that you would take?

A. That I would take.

Q. By whom were these foreign drafts or checks collected, in the ordinary course of business, after you had passed them over to the note teller?

A. By his department.

Q. Would you be informed whether a draft or check was collected or not?

A. No, sir.

Q. Would you be informed when it had not been collected?

A. Possibly. There was no reason why I should be.

Q. Why not?

A. Because it passed out of my control entirely after it was entered in the cash of that day.

Q. Under whose department would it come in case it came back protested?

A. The note teller's.

Q. From whom would he get it?

A. I can only tell from my general knowledge of the ordinary course of business. I would not know anything about it after it left my control.

Q. Do you mean to say that you would not be informed at all of the non-payment of a draft?

A. I probably would not. It would be incidentally if I was.

Q. Why not?

A. Because it was no longer in my possession. It was in the cash of the day.

Q. You felt no interest in the question—no responsibility in regard to the matter—after you had credited it as cash, whether it was paid or not?

A. No, sir.

Q. Where would the non-payment of the draft be entered, so far as the note teller was concerned or the depositor?

53 A. That was in the note teller's department. I don't know of my own knowledge, except from general knowledge of the course of business.

Q. Well, what was the course of business?

A. The course of business would be that the draft, if it came back not good, would be sent out to the party who deposited it, and he would be asked for a check on our own bank to take it up.

Q. Sent out by a runner?

A. Yes; the note teller would send him out with it.

Q. And in that case would there be any entry whatever on the books of the bank to show that it had not been collected?

A. The note teller's book would show that the bank we had charged it to would be credited back with it.

Q. That would show that the draft had been dishonored?

A. Yes.

Q. What entry, if any, would be made in the ledger account of the depositor?

A. When they gave a check, that check would be credited to their account on the ledger.

Q. Suppose that no check was delivered, would the amount of the protested draft be charged in the ledger account against the depositor?

A. Yes, sir.

Q. So that the bank had the means of charging to the depositor in his account the amount of the protested draft, if it came back protested?

A. Yes, sir.

Q. You would not have anything to do with that department?

A. No, sir.

Q. Did you have any written instructions from the board of directors of your bank as to your duties?

A. No, sir.

Q. Did you ever receive from the board of directors or from any officer of your bank any instructions as to your receiving as cash foreign drafts?

A. Yes; I have had instructions.

54 Q. When were they given to you?

A. They were not general; they were in some specific cases.

Q. No general instructions?

A. No.

Q. Special instructions in special cases?

A. Yes, when I asked them.

Q. And when you did not ask you had no instructions?

A. No, sir.

Q. Then, may I ask where you derived your authority to receive as cash a draft drawn on some bank or individual out of the city?

A. My authority was vested in the office I held.

Q. As an incident to the office?

A. Yes, sir.

Q. Do you wish to be understood that it is incident to the office of a receiving teller whether he shall enter drafts or checks on other people, third parties, or on banks out of the city, as cash, on his own judgment, or whether they will be paid or not?

A. Yes; I have already told you that in special cases I would have special instructions.

Q. Give us one of these special cases.

A. That was a case; the ticket I had a few minutes ago of November 3, 1883, marked Exhibit C.

Q. You say you recollect the circumstances of that ticket?

A. Yes, sir.

Q. And you recollect the circumstance that one of those items on that ticket was a draft?

A. A foreign item.

Q. You cannot tell now whether it was a draft or what sort of foreign item it was?

A. No, sir.

Q. And you would not have recollected at all that it was a foreign item if you had not found your letter "F" on it?

A. I don't know; I think I would; I cannot say what I would have recollected if I had not seen that.

55 Q. You say you cannot recollect whether it was a draft; of course you do not not know on whom it was drawn or any of the particulars?

A. No, sir; I didn't suppose I should ever be asked about it again.

Q. Whom did you apply to in regard to that transaction?

A. The president, James D. Fish.

Q. What did you ask him and what did he say?

A. I said, Mr. Fish, here is a large foreign item in the St. Louis and San Francisco Railway Company's deposit; shall I take it as cash? He looked at it and said, Certainly; take it as cash, by all means. I then went back to the desk, ticked off the deposit, and entered it in the pass-book; no, I don't think I had the pass-book for that; my recollection is I did not have any pass-book. (Witness looks at the pass-book of the plaintiff with the Marine Bank, and then continues:) No, sir; I did not have the pass-book. I went back to my desk and put the ticket on the spindle and put the checks in their proper places, and that ended the transaction so far as the St. Louis and San Francisco was concerned.

Q. You recollect all that?

A. Yes, sir.

Q. And you have just examined the pass-book and you don't find the entry of that in your handwriting?

A. No, sir.

Q. And that satisfies you that you had not the pass-book at the time the deposit was made?

A. It was not at my desk.

Q. And, notwithstanding that, you recollect going through all this detail?

A. Yes, sir.

Q. And yet you cannot tell us what was the nature of the deposit, whether it was a draft, on whom it was drawn, or anything about it?

A. Only that it was a foreign item.

Q. Do you recollect any other occasion on which you asked special instructions in regard to receiving foreign drafts as cash for anybody?

A. Yes, sir.

56 Q. Do you recollect any other occasion on which you made that inquiry in regard to the San Francisco Company?

A. I don't recall any other.

Q. Look at the pass-book and state if you know by whom that entry was made corresponding with the entry from the ticket of November 3, 1883; see if you can tell by whom it was made. (Witness looks at the pass-book.)

A. Yes; I can tell from the figures who made the entry.

Q. Whose entry is it?

A. The book-keeper's.

Q. What was his name?

A. Culver.

Q. You can tell by his figures that he made the entry?

A. Yes, sir.

Q. Look at the pass-book subsequent to April 28, 1884, on the last two pages of the pass-book, and state whether any of the entries on those two pages are *two* in your handwriting, and which of them.

A. The entry "Apr. 28, 1884, C. 30,000."

Q. That is on the deposit side?

A. Yes, sir.

Q. Is any of the rest in your handwriting?

A. That is in my handwriting, "papers prepared."

Q. What does that mean?

A. That means that when the bank failed and they came up to prove the account I made up the papers.

Q. Whose handwriting is the entry "June 13, int. to $\frac{5}{6}$, 790" in?

A. Henry A. Daboll's, the book-keeper.

Q. In whose handwriting are the residue of the entries on both of those pages?

A. They are all George Force's, the book-keeper now present.

Q. By looking at the entry in the pass-book under the date of May 5th, "17,835," you are enabled to state that you had not the pass-book at the time of the receipt of the deposit?

57 A. Yes, sir.

Q. And that it must have been entered by Mr. Force?

A. Yes, sir.

Redirect examination by Mr. DEVELIN:

Q. You were about to tell that you recollect of another occasion other than the one of the 3d — November, 1883, when you asked for instructions about receiving some foreign paper as cash?

A. I have frequently, when checks have been very large and I thought I would be taking too much upon myself, submitted such checks to the officers to see whether they would be willing to take them as cash.

Q. Otherwise, whatever was offered to you in the way of outside paper you took as cash?

A. If I received it at all it was taken as cash.

Q. You have answered that notes and other papers for collection had been brought to you almost daily, but you did not receive them?

A. I never received any for collection.

Q. You sent them to the note teller?

A. Everything that was to be taken for collection—that is, taken and credited to the account of the depositor subsequent to its collection—went to the note teller.

By Mr. BURRILL:

Q. If they came to you you wouldn't take them?

A. Yes, sir; Everything that I received at all was cash, Mr. Burrill, or was deposited as cash.

Q. Whatever you did not receive you sent to the note teller?

A. Yes. I would say this is not a proper thing for this department to take, and for to take it to the note teller. Frequently boys would bring notes for collection and lay them down on my desk and I would send them to the note teller.

By Mr. DEVELIN:

58 Q. You have answered that the bank had the means of charging up dishonored paper to the dealer's accounts on the books?

A. They had that right.

Q. If the dealer had no balance?

A. Then we would have to get it the best way we could. If the dealer did not have a balance of course we might have to sue for it.

Q. You could not change it on the books?

A. That would overdraw the account.

Q. If you received a certified note as cash it was a note that was due on the day you received, and no other?

A. Yes, sir; no other.

Q. All papers that you received went on one spindle, and then after the bank was closed you separated them and put the foreign on this slip you talked about?

A. Everything went on one spindle—that is, the deposit tickets.

Q. I am speaking of those.

A. There was no separation of those.

Q. When did you make out this foreign slip?

A. As I had time, during the day, or after I had got through. That was part of my assets to get up my proof with.

Q. You were under the impression before you looked at the pass-book just now that there was no pass-book at the time of this deposit of November 3d, 1883?

A. I was.

Q. And looking at the pass-book and seeing that the entry was not in your handwriting confirmed your impression?

A. Yes, sir.

Recross-examination by Mr. BURRILL:

Q. What is it you said went on the spindle?

A. These deposit tickets.

Q. But when you received a foreign draft did you put it in a different place from where you put the domestic drafts?

A. Yes, sir; a different pigeon-hole.

59 Q. And you made up your foreign list during the day from the drafts which were in the foreign pigeon-hole?

A. Yes, sir.

Q. You recollect the morning of the 6th of May, 1884?

A. I do, sir.

Q. Did you receive any deposits on the morning of that day?

A. Yes, sir.

Q. Up to how late?

A. Twenty minutes of eleven o'clock.

Q. What was the nature of those deposits?

A. They were general—all kinds; money checks on all the banks in the city and probably foreign. There was nothing to refresh my memory. It was regular business.

Q. You received deposits up to twenty minutes to eleven?

A. About that time.

Q. How do you fix that time as the time you ceased to receive deposits?

A. Because it was about that time that I went up to the clearing-house to see Mr. Fish.

Q. Had Mr. Fish been at the bank at all that morning?

A. He had been.

Q. What time was he there?

A. I don't remember seeing him in the bank. Somebody told me that he had asked if I had arrived.

Q. You did not see him?

A. I did not see him.

Q. Who sent you to the clearing-house?

A. The assistant cashier.

Q. Who was he?

A. N. D. Daboll.

Q. Did you go to the clearing-house?

A. I did.

Q. Did you find Mr. Fish there?

A. I did.

Q. What did Mr. Daboll tell you to do?

A. To see Mr. Fish, and to remind him of some checks that Ward had deposited the day before.

60 Q. What checks?

A. Ward's checks on the First National Bank.

Q. When were they deposited?

A. Deposited Monday; and we failed Tuesday morning.

Q. Monday was the 5th of May?

A. Yes, sir.

Q. On what bank were those checks?

A. First National Bank.

Q. And in the ordinary course of business they would go through the clearing-house on the morning of the 6th May?

A. Yes, sir.

Q. What was the amount of those checks?

A. They amounted to $215,000, altogether.

Q. Can you give the amounts?

A. I can't give you the amounts. One was $75,000 and the other was $80,000, I think.

Q. Do you know what was the balance against the Marine Bank at the clearing-house on the morning of the 6th May?

A. About a half a million dollars.

Q. These $215,000 of checks were drawn by Ferdinand Ward on the First National Bank of New York, and had been sent by the Marine Bank through the exchanges to be exchanged on the morning of the 6th of May?

Defendant's counsel objects to all this line of examination as immaterial, irrelevant, and incompetent.

A. Yes.

Q. In the exchanges on the morning of the 6th of May, those $215,000 of checks on the First National Bank had been credited to the Marine Bank and charged to the First National Bank?

Like objection by defendant's counsel.

A. Yes; at the clearing-house.

61 Q. Do you know about the First National Bank and Fish?

A. No, sir.

Q. Do you know how that matter was closed up?

A. No, sir.

Q. Any entry on the books of the Marine Bank in regard to it?

A. I don't know.

Q. Who knows in regard to that?

A. A book-keeper, or perhaps the assistant cashier.

Q. Can you, and, if so, state, about what the amount to the credit of Ward on the morning of the 6th of May, 1884, was?

A. I don't know.

Q. That amount did not equal the amount of those checks?

A. I don't know.

Q. When you found Fish on the morning of the 6th of May, what did you say to him?

Like objection by defendant's counsel.

A. I said that I had been sent up there by Mr. Daboll to call his attention to the fact that we had such checks in the exchanges.

Q. Anything more?

A. Nothing.

Q. Did you state that to Fish?

A. Yes, sir.

Q. What did he tell you?

A. I don't think he said anything.

Q. Where did you find him?

A. In the manager's office at the clearing-house.

Q. Did you see him at the First National Bank?

A. I did not.

Q. Mr. Camp is the manager of the clearing-house?

A. Yes, sir.

Q. Do you know how the amount of those $215,000 of checks was settled with the First National Bank?

A. I don't remember.

62 Q. Do you know whether any, and, if any, what, securities were taken by Fish to that bank or to any other national bank?

A. I don't know. I have carried securities to the clearing-house on the morning of the 6th of May.

Q. To whom did you give them?

A. I merely helped to carry them.

Q. By whose request did you take them?

A. By request of the president of the bank.

Q. That is, Fish?

A. Yes, sir.

Q. About what time was that?

A. I did not take a note of the time.

Q. Was it before ten o'clock?

A. No, sir.

Q. Was it before twenty minutes of eleven?

A. No, sir; it was very nearly twelve o'clock.

Q. What were these securities in?

A. In a leather trunk that I borrowed from the Fourth National Bank.

Q. Did you take this trunk there before or after the Marine Bank closed?

A. After the bank closed.

Q. What hour do you fix on the morning of the 6th of May at which the bank closed?

A. I don't know, for I was not in the bank when it closed. It closed while I was to the clearing-house.

Q. It was after twenty minutes to eleven o'clock?

A. Yes, sir.

Q. How long after?

A. I don't know.

Q. When did you get back to the bank after you left it at twenty minutes to eleven o'clock?

A. I don't recollect the time I may possibly have been back in the meantime. My best recollection is that I went there with this leather trunk which Mr. Baldwin, president of the Fourth National Bank, told me to go over to his bank and get it.

Q. When did you go back, if at all, to the Marine Bank for those securities?

A. I cannot tell. I cannot place the thing exactly. It was in the neighborhood of twelve o'clock.

63 Q. Where did you see Mr. Baldwin?

A. At the clearing-house.

Q. When you first went there?

A. No, sir; I saw nobody but Mr. Fish, and he told me to go and see if I could find any trace of Ward; that he believed that Ward turned out a villain, and to go and see if I could find him or anything of him. I went to Ward's office and looked around the street

and couldn't get a word of him. Then I went back to Mr. Fish and reported that they knew nothing of him at his office.

Q. About what time was that? How long were you gone?

A. I wasn't gone more than ten minutes.

Q. When you came back Mr. Baldwin was there?

A. Yes, sir.

Q. And did Baldwin tell you in Fish's presence to go to the Fourth National Bank and get this trunk?

A. I think Fish was present.

Q. What did you do when you took it down to the Marine Bank?

A. I told the assistant cashier, Daboll, that Mr. Fish, the president, wanted me to bring up all the good collaterals; for us to bring up in the trunk all the good collaterals we had there to the clearing-house.

Q. You say "us."

A. I mean Mr. Daboll and myself.

Q. What did Daboll do?

A. He went and told the cashier, Mr. Fish's son.

Q. What took place then?

A. The cashier and assistant went to the vault of the bank and selected the securities—I don't know what they were—and as soon as the box was filled it was closed, and if I recollect clearly about it Mr. Henry Barrow, who is here present, went up with us to help me to carry the box, or going behind with a pistol and we went up to the clearing-house with that box full of securities.

Q. What did you do with the box?

A. I left it on the table, where there was a whole lot of bank presidents.

64 Q. Was Baldwin there?

A. Yes, sir.

Q. Was the Third National Bank president there?

A. I don't know him.

Q. Mr. Booth—or its cashier?

A. I don't know.

Q. State what was done, if you know, with the securities.

A. That was all that was done while I was there. I left the box down and came away.

Q. Was there any list made of the securities they took?

A. Not at the Marine Bank. It was made afterwards.

Q. Made where?

A. I can only give that from information. I didn't see it made.

Q. There was a list of the securities made when they were taken out of the bank?

A. No, sir; so far as I know.

Q. How long were they taking them out of the vault?

A. About 15 minutes.

Q. Can you state whether they were taken indiscriminately?

A. I cannot.

Q. Who went into the vault?

A. The cashier and assistant cashier, Mr. Daboll and John D. Fish.

Q. Did you ever see those $215,000 of checks afterwards?
A. Yes, sir.
Q. Where?
A. I saw them at the clearing-house that morning.
Q. Did you ever see them after that morning?
A. No, sir.
Q. Who had them at the clearing-house?
A. Mr. Scofield, cashier of the First National Bank.
Q. What was done with them?
A. I only know that he brought them in and laid them down before Mr. Coe.
65 Q. He is one of the committee of the clearing-house?
A. Yes, sir.
Q. You don't know what was done with them after that?
A. No, sir.

WILBUR F. ROSSELL, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. DEVELIN:

Q. What is your name?
A. Wilbur F. Rossell.
Q. You reside in New York?
A. No, sir; in Brooklyn.
Q. You were assistant receiving teller of the Marine National Bank in 1883 and 1884?
A. Yes, sir.
Q. I show you the deposit slip (dated April 10th, 1884), being "Exhibit D" of this date, and ask you if you received the money that is stated or the amount that is stated on that ticket. (Ticket shown witness.)

Objected to by plaintiff's counsel as irrelevant, immaterial, and incompetent.

A. Yes, sir.
Q. I show you the pass-book of the plaintiff with the Marine Bank and call your attention to an entry of the same date as that deposit, to wit, April 10, 1884, and the figures "18,930." Are those words and figures in that entry in your handwriting?
A. Yes, sir.
Q. You made them at the time of the deposit?
A. Yes, sir.
Q. And they are correct?
A. Correct.
Q. And you received that amount at the Marine Bank?
66 A. Yes, sir.
Q. As assistant receiving teller?
A. As assistant receiving teller.
Q. Was that made in domestic or foreign paper?
A. Made in foreign paper.
Q. Do you remember this?

A. I don't remember it; I simply take it from the evidence of the ticket.

Q. How do you know it was in foreign paper?

A. Because it was checked as being foreign paper.

Q. What is that check?

A. The letter "F" on the face of the deposit ticket.

Q. You made that at the time?

A. Yes, sir.

Q. And it is correct?

A. It is correct.

Q. You would not have made it if it was not correct?

A. No, sir.

Q. What does that entry in that book under date of April 10, 1884, indicate as to the character of the deposit—whether it was received as cash or for collection?

Like objection by plaintiff's counsel.

A. It is cash.

Q. I show you Exhibit B of this date, being a deposit slip dated 5th May, 1884; did you receive that deposit? (Paper shown witness.)

A. I did, sir.

Q. Was that deposit made in domestic or foreign paper—that is, city or outside of the city?

A. Foreign; outside of the city.

Q. How do you know that fact?

A. On account of my letter "F."

Q. Did you put the letter there at the time?

A. I did.

Q. That indicated, as in the other case, that it was foreign?

A. Yes, sir.

67 Q. And that entry is correct?

A. Yes, sir.

Q. And you would not have made it if it was not correct?

A. No, sir.

Q. On the same page of this pass-book, beginning with the date March 17, 1884, and ending with April 25th, on the same page where the 10th April deposit is entered, how many entries are there in your handwriting from the top of the page to the bottom, April 25? (Book handed witness.)

A. That on the 31st of March, $30,000; one on the 10th of April, $18,930; the 11th of April, $20,025; the 14th of April, $726.37; and the 21st of April, $50,004.19.

Q. And some of them above and some below, but on the same page and of the same character of entry as that of April 10th?

A. How do you mean the same?

Q. They are all cash?

A. All cash.

Q. And some of them are below and some of them above the entry of April 10th?

A. Yes, sir.

Q. I show you a deposit slip of August 23, 1883, being marked Exhibit E of this date, the deposit being two, $21.66 and $4,750, making in the aggregate $4,771.66, and ask you to look at it, and also at this pass-book of the plaintiff with the Marine Bank, and ask you if you received this deposit. (Book and ticket handed witness.)

A. I am not positive about it.

Q. Look at the pass-book and look at the ticket and say whether or not you received it. (Witness looks at ticket and pass-book.)

A. Judging from them. I should say that I did not.

Q. I handed you the wrong ticket. I show you another ticket, dated August 27th, 1883, marked Exhibit "E" of this date, the deposits being two, $9,000 and $50, making $9,050; look at that slip and the pass-book entry of the same date and say whether
68 you received that deposit. (Ticket and pass-book shown witness.)

A. I cannot say positively; I presume I did.

Q. What does the letter "R," opposite the date August 27, 1883, and between that date and the amount "$9,050," indicate?

A. That means "Rossell," my initial.

Q. The entry "R" is in your handwriting?

A. I made the entry in the pass-book.

Q. Would you have made that entry if you had not received the deposit?

A. I might, possibly.

Q. Under what circumstances?

A. For instance, sometimes in the absence of Mr. Carr, and when Mr. Carr had been away for any length of time and I have been out to lunch, Mr. Street would come and receive the deposits; sometimes he would receive the deposits, put the amount in the pass-book, and lay the deposits to one side and not check them off, and I would check them off when I came in.

Q. As a general rule, when you put your initial "R" in the book, as you did opposite that of August 27, 1883, and before the amount "$9,050," you received the deposit?

A. Yes, sir; almost invariably.

By Mr. BURRILL:

Q. Are the figures in your handwriting?

A. Yes, sir.

By Mr. DEVELIN:

Q. This entry is of the same class of entries as the deposit of May 5th, 1884?

A. Yes, sir; cash.

PLAINTIFF'S COUNSEL: I object to all that as irrelevant, immaterial, and incompetent.

Cross-examination by Mr. BURRILL:

Q. Look at Exhibit B of this date and Exhibit D of this
69 date and state whether you have any recollection of either of the transactions mentioned on these deposit tickets. (Tickets shown witness.)

A. I have none. It was May 5th. I have a recollection.

Q. Why have you a recollection of May 5th?

A. Because I referred the matter to the assistant cashier as to whether it should be received as cash, and he said yes.

Q. On that you entered it?

A. Yes, sir.

Q. And you wouldn't have entered it without?

A. No, sir.

Q. Why not?

A. Because I was only assistant receiving teller, and when Mr. Carr was away if there was any amount that came that was foreign over five hundred dollars, for instance, I would submit it to an officer of the bank.

Q. When did you submit it to him?

A. The same day; the same time.

Q. How do you mean the same time?

A. When the deposit was made.

Q. Were you there when the deposit was made on May 5th.

A. Yes, sir.

Q. How do you know?

A. Because I was there all the morning.

Q. Is that the only reason that you say why you received the deposit?

A. I have got my mark, "F," on it.

Q. Does that mark "F" indicate that you personally received that deposit?

A. Yes, sir.

Q. How?

A. Because I checked it.

Q. When?

A. At the time that I received that deposit.

Q. But you may have done it afterwards?

A. No, sir.

Q. What did you do with the draft?

A. I took it around to the assistant cashier.

70 Q. What did you do after that with it?

A. Put it in the foreign pigeon-hole.

Q. And put this letter "F" on it?

A. Yes, sir.

Q. When did you check it off?

A. When I received it.

Q. On the ticket?

A. Yes, sir.

Q. Why didn't you enter in the pass-book?

A. It wasn't there.

Q. You are certain about that?
A. I don't remember whether it was there or not.
Q. You had no authority to receive this draft or enter it until you got it from the assistant cashier?
A. No, sir; until I got it from some authority above myself.
Q. And you went to Mr Daboll?
A. Yes, sir.
Q. What did you go to him for?
A. To ascertain whether he would receive it for cash.
Q. Why did you do that?
A. Because I had no authority to receive unless I had it from some authority above me.
Q. You had no authority of your own to receive it?
A. No, sir.
Q. What did you do with the deposit ticket?
A. I put it on the spindle.
Q. The same as other tickets?
A. Yes, sir; and then the credit clerk credited it on the credit book.
Q. And why had it that on it—the letter "F?"
A. To designate it was foreign. It was a rule to mark all large foreign checks as foreign.
Q. Why?
A. For reference.
Q. Any other reason?
A. I don't know.
Q. Do you know of any other reason why?
71 A. Nothing, except that it was the rule that all foreign items should be marked "F," if they were a thousand dollars or more.
Q. That was the rule?
A. Yes, sir.
Q. Who gave you those instructions?
A. Mr. Carr.
Q. Do you — where he got them from?
A. I do not.
Q. You had nothing to do with making any entry from those tickets?
A. Unless an entry in the pass-book. I wouldn't enter it in anywhere else.
Q. That is from that ticket?
A. Yes, sir.
Q. Did you have anything to do with entering it on the credit book?
A. No, sir.
Q. Nothing to do with that?
A. No, sir.
Q. This deposit of April 10th, 1884, do you recollect anything about that?
A. No, sir; nothing particular.

Q. Do you know what were the items on the deposit ticket of August 27th, 1883, which is marked Exhibit E of this date?
A. No, sir.
Q. Is the whole entry under date of August 27th, 1883, in the pass-book yours?
A. Yes, sir.

Redirect examination by Mr. DEVELIN:

Q. Your recollection is that the pass-book was not handed in with the slip on the 5th of May, 1884?
A. I don't remember anything about that.

Recross-examination by Mr. BURRILL:

Q. Do you remember who brought in the deposit on the 5th of May, 1884?
A. No, sir; I do not.
72 Q. You don't recollect anything about it?
A. I remember going to the assistant cashier and——
Q. Never mind that. Do you recollect anything further?
A. No, sir; I remember that it was a representative of the St. Louis and San Francisco Railway Company presented it.
Q. Did you have any conversation with him?
A. I don't recollect that I did.
Q. Do you think Mr. Carr was there?
A. I am pretty sure he was not.
Q. Because you find the letter "F" in your handwriting?
A. That is one reason.
Q. Any other?
A. He was away on the morning of May 5th.
Q. Do you recollect what time that deposit came in?
A. I do not.

Adjourned to Thursday, April 30th 1885, at three o'clock p. m.
Adjourned to Monday, May 4th, 1885, at three o'clock p. m.
Adjourned to Tuesday, May 12th, 1885, at three o'clock p. m.
Adjourned to May 19th, 1885, at 3 o'clock p. m.

73 MAY 19, 1885.

Parties met pursuant to adjournment.
Present: John E. Burrill, Esq., for plaintiff; John E. Develin, Esq., for defendant.

GEORGE W. FORCE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. DEVELIN:

Q. What is your name?
A. George W. Force.
Q. During the years 1883 and 1884, down to the 6th of May, 1884, you were employed by the Marine National Bank?
A. Yes, sir.
Q. In what capacity?
A. Book-keeper.

Q. What particular line of duty fell under your charge as book-keeper?

A. The duties pertaining to that position.

Q. What books did you keep?

A. The individual ledger.

Q. That is, the ledger in which the accounts of individuals were entered?

A. Yes, sir.

Q. How were those entries made by you in that ledger—from what evidence or information?

A. Do you mean as to debits or credits?

Q. I mean as to debits?

A. The entries were made directly from checks.

Q. I mean credits.

A. Credits would be made directly from the deposit slips as made to the receiving teller; we would get them from the receiving teller's desk; as to loans——

Q. I don't care anything about that. Were the credit entries made on the day, at the time of the deposits?

A. Made on the day that they were deposited.

74 Q. From where did you receive the deposit slips?

A. From the receiving teller's desk.

Q. Where were they there?

A. They were on a small desk adjoining where he stood.

Q. Were they on a spindle?

A. Yes; there were three spindles and three ledgers. There was a spindle for each ledger on the receiving teller's desk, and the deposits from A to F would be on one spindle, from G to P on another spindle, and from Q to Z on a third spindle.

Q. Between which letters did you keep the credits?

A. Q to Z.

Q. What is this book I now show you? (Book shown witness.)

A. It is the individual deposit ledger from Q to Z.

Q. Of deposits in the Marine Bank?

A. Yes, sir.

Q. In 1883?

A. Yes, sir.

Q. Look under the date of November 3, 1883, and see if there is any entry showing a deposit by the St. Louis and San Francisco Railway Company in the Marine Bank on that day; and, if so, what was the amount of it?

Objected to by plaintiff's counsel as irrelevant, incompetent, and immaterial.

A. There is a deposit to the credit of the St. Louis and San Francisco Railway Company on November 3d, 1883, of $17,860.

Q. In whose handwriting is that entry?

A. That is, I think, in the handwriting of Mr. Culver.

Q. That is not yours?

A. No, sir.

Q. Was Culver an assistant book-keeper?

A. He was book-keeper on that ledger at that time. We rotated, and he was on this ledger at that time.

Q. Where is Culver now?

A. He is in Colorado.

75 Q. He was book-keeper at that time?

A. He seems to have been on the ledger at that time.

Q. How many entries are there on that page in his handwriting—I mean in the lines?

A. I think all are in his handwriting.

Q. How many above and below this entry?

A. Seven before and three after, on that day.

By Mr. BURRILL:

Q. In that column?

A. Yes, sir.

By Mr. DEVELIN:

Q. All his handwriting?

A. Yes, sir.

Q. What is this book I now show you? (Book shown witness.)

A. It is the individual deposit ledger, Q to Z, January to June, 1884, of the Marine National Bank.

Q. Showing the deposits made by dealers with the Marine Bank the first letters of whose names were between those letters?

Like objection by plaintiff's counsel.

A. Yes, sir.

Q. Or in which are entries of deposits made by depositors during that time whose names began between those letters?

Like objection by plaintiff's counsel.

A. Yes, sir.

Q. Turn to the date of April 10, 1884.

A. I have that date.

Q. Is there any entry in that book on that date of a deposit made by the St. Louis and San Francisco Railway Company in the Marine Bank?

Like objection by plaintiff's counsel.

A. Yes, sir.

76 Q. In whose handwriting is that entry?

A. It is not in mine.

Q. Do you know whose it is in?

A. I am not able to say positively, but it looks to me to be the writing of a Mr. Munn.

Q. What was his first name?

A. Horatio.

Q. Where does he reside?

A. He resides in Brooklyn; where, I don't know.

Q. Turn to the date of May 5th, 1884, and see is there any entry

on that date of a deposit by the St Louis and San Francisco Railway Company in the Marine Bank?

A. Yes, sir.

Q. What is the amount?

A. $17,835.

Q. In whose handwriting is that entry?

A. That is in my handwriting.

Q. Have you any recollection of the fact of that deposit outside of that entry?

A. No recollection.

Q. You made that entry at the time?

A. Yes, sir.

Q. In the usual course of your business?

A. Yes, sir.

Q. It is correct?

A. Yes, sir.

Q. And it would not have been made by you if it was not correct?

A. No, sir.

Q. Look at the deposit ticket of May 5, 1884, Exhibit B, of 27th April, 1885, and state whether this entry in the individual deposit ledger, which you have just referred to was made from that deposit ticket.

A. It was made from that deposit ticket.

Q. You took the ticket from the spindle and made the entry from the deposit ticket?

A. Yes, sir.

77 Recross-examination by Mr. BURRILL:

Q. Do you recollect as a matter of fact that you took that deposit ticket off the spindle and made the entry from it in the individual deposit ledger, or do you testify to that because it was the usual course of business?

A. Because that would be the usual course of business.

Q. Is there any mark on that deposit ticket to show that you ever saw it before?

A. There is no mark on it to indicate that I ever saw the ticket before.

Q. These deposit ledgers which you have produced here contain a printed list of all the depositors' names within the letters covered by the particular ledger?

A. Yes, sir.

Q. In the left-hand margin of the page?

A. Yes, sir.

Q. And then the page is divided into columns, there being three columns—one headed "checks," one "balance," and one "deposits?"

A. Yes, sir.

Q. There being three columns for each business day?

A. Yes.

Q. And the date is affixed at the top of the page?

A. Yes, sir.

Q. These entries under the head of "deposits" do not give the particulars of the deposits—only the gross sum?

A. Only the gross sum?

Q. Look at the pass-book of the St. Louis and San Francisco Railway Company with the Marine National Bank, now shown you, and state whether any of the entries on the last two pages of that book, commencing "April 28, 1884," and ending June 13th of the same year, are in your handwriting. (Pass-book shown witness.)

78 A. All the writing and entries on both sides are in my handwriting, except the top entry, "April 28, 1884, C, 30,000," and the entry "June 13, int. to $\frac{5}{6}$, 790," and the words, "papers prepared."

Q. State in whose handwriting are the entries which are not in yours.

A. The entry "April 28, 1884, C, 30,000" is in Mr. Carr's handwriting.

Q. The entry, "June 13, int. to $\frac{5}{6}$, 790?"

A. Is in the handwriting of Mr. Henry Daboll.

Q. And the words "papers prepared?"

A. That is, I think, in the handwriting of Mr. John Carr.

Q. Look at that-pass book and all the entries in it, commencing on May 4th, 1883, and state whether there are any other entries in that book in your handwriting prior to the entries on the last two pages — which your attention has just been called. (Book handed witness.)

A. On both sides of each page?

Q. Yes.

A. Nothing.

Q. In whose handwriting are the other entries in that pass-book preceding those of April 28, 1884?

A. Mr. Gilchrest's is the first one; and I see Mr. Street's writing and Mr. Carr's, Mr. Rossell's, Mr. Culver's, and William Fish's. I am looking on both sides. That is all.

By Mr. DEVELIN:

Q. You are looking on both sides—credit and debit sides?

A. Yes, sir.

By Mr. BURRILL:

Q. Who was Gilchrest?

A. Melvin H. Gilchrest. He was a book-keeper.

Q. And Fish was a book-keeper?

A. He was, temporarily, in the absence of myself.

Q. Do you know from recollection when it was that you made the entry in this pass-book "414,915.22" on both sides?

A. No, sir.

Q. Do you know from recollection when it was that you made the entry "313,820.72" on both sides?

79 A. Not as to the date.

Q. Do you recollect when it was that you made the entry "137,728.72"—the date?

A. No, sir.

Q. In the ordinary course of business the entries of deposits would be made in the pass-book by the receiving teller, would they not?

A. Ordinarily; yes.

Q. And it was only in case of the absense of the pass-book, when the deposit was made, that the entry would be made by the book-keeper?

A. Yes.

Q. The entry in the pass-book, under date of May 5, 1884, "$17,835," to which your attention is called, was that made from the entry in the individual deposit ledger or from the deposit ticket by you?

A. That was made from the ledger; directly from the ledger.

Q. Can you tell by looking at this deposit ledger to which you have referred when it was that you were placed in charge of the deposits made by the San Francisco company?

A. Yes; I can.

Q. Look and see. (Witness examines deposit ledger.)

A. I took charge of that ledger on May 1st.

Q. That is, you say you took charge of the ledger containing accounts of depositors between Q and Z on the 1st of May, 1884?

A. Yes, sir.

Q. Can you tell when you had it before that time?

A. I was absent from the bank during March and April, and I see that I returned to the bank and took charge of my ledger on the 1st of May. Now, I can tell you when I first went on this ledger and when I left it. I went on this ledger the 18th day of February, 1884, and continued until the afternoon of the 29th of February, 1884, when I left the bank, and was absent for two months.

Q. Who took charge of this ledger containing entries of deposits by depositors between Q to Z during the months of March and April, 1884?

80 A. That is William Fish's writing (indicating). William Fish was on this ledger from the 29th of February to the 29th of March, then Mr, Munn took charge of it. He took charge on the afternoon of the 29th of March, and he continued in charge until the 1st of May, 1884.

Q. When you resumed?

A. Yes, sir.

Redirect examination by Mr. DEVELIN:

Q. Mr. Force, look at that entry of 5th May, 1884, in the deposit ledger, $17,835, to the credit of the St. Louis and San Francisco Railway Company, and say if it was from that entry that you made the entry in the plaintiff's pass-book, May 5, of the same amount?

A. Yes, sir.

Q. You did not receive that money on deposit—you were not acting as receiving teller at the time that deposit was made?

A. No, sir.

Q. When you entered that in the pass-book—made that entry of that credit of $17,835—did you verify it in any way?

A. Yes, sir; with the credit book.

Q. Kept by the receiving teller?
A. Yes, sir.
Q. In which the entry from the deposit slip was first made?
A. Yes, sir.
Q. That was your universal rule when you made an original entry in anybody's bank book?
A. Yes, sir.
Q. You stated four names whose entries appear in that pass-book. Were all those on each side of the book?
A. The only writing on the right side of any of these pages——
Q. What is the right side?
A. The debit side (witness continues) would be the ordinary writing of the book-keeper for the purpose of balancing the book.

81 Q. How is it there?
A. It is in every case the book-keeper's.
Q. Who was the book-keeper?
A. Mr. Gilchrist, Mr. Culver, and Fish.
Q. Does the writing of Mr. Culver, Mr. Gilchrist, or Mr. Fish appear on the credit side of the pass-book on any of the pages?
A. Yes.
Q. Whose first?
A. Mr. Gilchrist's appears first.
Q. How often on that side?
A. I would like to state, Mr. Develin, that these entries as made by Gilchrist are not all entries of deposits. When the book is balanced he is obliged to put on the credit side the amount of the balance, the date at which the book is balanced, and the amount of the balance, and these entries that I have been testifying to as being made in the writing of several persons are not entries of deposits.
Q. How many entries of deposits appear in the handwriting of each of the gentlemen you have named?
A. There are four entries of deposits in Gilchrist's writing; there are twenty-two entries of deposits in Mr. Culver's writing, two in Mr. Fish's, and one made by Mr. Munn.
Q. How many are there altogether of entries of deposits on those pages?
A. One hundred and six, I make it.

Recross-examination by Mr. BURRILL:

Q. Mr. Force, you stated that when you made that entry in the pass-book of May 5—$17,835—you verified it by the credit ledger. Why did you do that?
A. That was the rule.
Q. Under what circumstances was that the rule?
A. It was the rule given us for the purpose of verifying our work and making sure.
Q. Under what circumstances were you obliged to verify it by the credit book?

82 A. For instance, somebody——

Q. Under what circumstances did the rule require you to verify the entry by the credit book?

A. When I made the entry in the pass-book.

Q. Who gave you the rule?

A. That I cannot say.

Q. What was the rule? Tell it in plain English.

A. The rule was, as I understood when I went on the ledger, that when we had occasion——

Q. Who were "we?"

A. The book-keepers (witness continues) had occasion to enter a deposit from the ledger in the pass-book for safety; they were to go to the credit book and verify that entry, as made in the pass-book, with that in the credit book, for the purpose of ascertaining whether the entry as made in the credit book was under the same head and credited to the same party and the same amount.

Q. Under what circumstances did book-keepers make entries of deposits in customers' pass-books?

A. In balancing the pass-book, if it was found that there had been a deposit made and not credited in the pass-book it would be then the duty of the book-keeper to credit that deposit in the pass-book for the purpose of balancing that account.

Q. Do you mean that if on comparing the pass-book with the deposit ledger there appeared to be amounts which had been omitted from credit to the depositor you made the entry of that deposit in the pass-book?

A. Yes, sir.

Q. And it was only under such circumstances the book-keeper ever made an entry of a deposit in the pass-book?

A. That is about all I can remember now.

Q. And you made that entry when you balanced the book?

A. We made the entry when we balanced the book [and we would also make an entry on the request of the dealer.]

83 Plaintiff's counsel moves to strike out that part of the last preceding answer which is enclosed in brackets. Defendant's counsel objects.

Q. Under what circumstances would the dealer request you to make an entry?

A. It very frequently happened that the dealer would bring a deposit to the bank without his pass-book. He would leave the deposit, and the next day or that same day, perhaps, would bring the pass-book to the book-keeper and would state that a deposit had been made and he would like to have the entry in his pass-book. Under those circumstances we would put that entry in the pass-book.

By Mr. DEVELIN:

Q. That is, the book-keepers would do so?

A. Yes, sir.

By Mr. BURRILL:

Q. But when the book was not in the bank or was not brought there afterwards to have the entry made the entry would be made when the book was balanced?

A. I have known instances in which depositors would come and ask whether a certain deposit had been entered——

Q. But aside from cases where they would come to you and request you to make an entry you would make the entry of a deposit which had been omitted when the book was balanced?

A. Yes, sir.

Q. These other parties that you spoke of whom you say made entries in this pass-book of deposits; just point out one of them to me (hands book to witness); point out to me any entry of a deposit made by a book-keeper.

A. There was one on April 2d, 1884, of $93,516.66.

Q. Whose handwriting is that?

A. That is Mr. Munn's handwriting.

Q. In all those cases in which entries were made of deposits by book-keepers, according to the ordinary custom and usage
84 in that bank, would they, before making the entry in the pass-book, prove it by reference to the credit ledger kept by the receiving teller?

A. Not before entering it in the pass-book. They would enter it in the pass-book first and verify it by the credit book after.

Q. How long after?

A. Immediately.

Q. Contemporaneously?

A. Yes, sir.

HENRY H. BARROW, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. DEVELIN:

Q. What is your name?

A. Henry H. Barrow.

Q. You were in the employ of the Marine National Bank during the years 1883 and 1884, up to the closing of its doors?

A. Yes, sir; I was.

Q. What capacity were you engaged in in the year 1884?

A. Assistant note teller.

Q. And in 1883 also?

A. Yes, sir.

Q. As such, was it part of your duty to transmit foreign paper—that is, paper drawn on banks or persons outside of the city of New York—to the places or residences of drawee?

A. I can only answer that by a qualification.

Q. Well?

A. They were sent to an out-of-town bank for collection. Boston collected all Massachusetts.

Q. You had charge of that?

A. I did.

Q. You had charge of transmitting all foreign paper to the proper points for collection?

A. Yes, sir.

85 Q. In transmitting such foreign paper you used a form of letter, did you not?

A. Yes, sir.

Q. I show you a paper which is marked "For Identification Ex. F., May 19, '85," and ask you if that is the form of letter universally used by you in transmitting during those years foreign paper for collection?

Paper shown witness.

Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant.

A. Ordinarily, except in special cases.

Q. The blank which appears in this paper you filled up with a description of the paper which was enclosed with the letter in an envelope?

A. Yes, sir.

Q. And then after you had done that you had the letter with what you had written on it, or rather the part that you had written on it, transferred to your letter book by the ordinary mode?

A. Yes; copied in the letter book.

Q. I show you a book (hands book to witness); is that the book in which those letters were copied?

A. That was one of them.

Q. During those years—just see what time?

Witness examines book.

A. From March 26, 1884, to—I can't see what the date is.

Q. It is subsequent to that time?

A. Yes, sir.

Q. Turn to the date of April 10, 1884.

A. I could tell that better by a magnifying glass. I think it is April 10th. I cannot testify what that date is.

Q. What is this book?

Book handed witness.

A. It is foreign cash No. 14.

86 Q. Are the entries under date of August 23, 1883, in your handwriting?

A. No, sir.

Q. Turn to August 27th, 1883, and see if that is in your handwriting.

A. No, sir; it is not.

Q. Whose handwriting are those in?

A. Mr. Brooks'.

Q. Look at date of November 3d, 1883.

A. That is in my handwriting.

Q. Is there an entry in your handwriting of the figures "17,835?"

A. Yes, sir.

Q. Does it show on whose account that entry was made? And, if it does, state on whose account.

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial.

A. Yes; the St. Louis and San Francisco Railway Company.
Q. Give us the nature of the entry.
A. By whom deposited? The St. Louis and San Francisco Railway Company, the drawee. It was a draft which was drawn on G. L. Goodwin, assistant treasurer at Boston, for $17,835.
Q. Do you recollect the transaction otherwise than by the entry there?
A. It was a transaction with the St. Louis and San Francisco Company, so this book shows me. I can't remember anything else.
Q. You do not remember anything besides?

Objected to by plaintiff's counsel as before.

A. By looking at the book I remember there was a question arose.
Q. What was the question?

Like objection by plaintiff's counsel.

87 A. The question was that Brooks, who took the book the next morning and entered all the small checks—he made two separate charges to Boston. There was a large check deposited on the night of the 3d, the charges being made on the 5th.
Q. What do you mean by charges?
A. When the checks are taken in they go to the receiving teller; from the receiving teller they go to the note teller. Then when they are listed on this book they are charged to the different banks.
Q. You made that entry in this book, foreign cash No. 14?
A. I made it.
Q. You made it on the 3d of November, 1883?
A. No, sir.
Q. Two days afterwards?
A. I made it on the night of the 3d of November, 1883.
Q. You made it in the usual course of business?
A. Yes, sir.
Q. The entry is correct and true?
A. Yes, sir.
Q. You would not have made it if it was not correct?
A. No, sir.
Q. What did that entry mean as to the nature of that deposit?

Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant.

A. It was a draft.
Q. Drawn by whom?
A. The St. Louis and San Francisco Railway Company.
Q. On what?
A. On G. L. Goodwin, assistant treasurer at Boston.

Q. When was that draft transmitted to Boston?
A. On November 3d.
Q. The same day it was deposited?
A. Yes, sir.
88 Q. And the entry was made from the original draft that you had in your possession at the time you made the entry?
A. Yes, sir.

Cross-examination by Mr. BURRILL:

Q. What do you call this book from which you read the entry just spoken of?
A. Foreign cash.
Q. It contains the entries of drafts or paper sent on by your bank for your collection to different places, does not it?
A. I don't know about the word "collection." They were not collected items. They had nothing to do with collection items in any way.

Plaintiff's counsel moves to strike out the last proceeding answer. Defendant's counsel objects.

Question repeated.
A. I can only answer with a qualification. It contains entries of checks deposited at the receiving teller's window, taken in the ordinary course of business as cash and sent on to other banks for collection and credit.

Plaintiff's counsel moves to strike out the last preceding answer. Defendant's counsel objects.

Q. Is it or not true that the paper entered in this book was sent on for collection by your bank?
A. For collection and credit.
Q. Credit to whom?
A. To us.
Q. Is it not the fact that the draft for $17,835, entered here under date of November 5th, 1883 (which you say ought to be No-
89 vember 3d, 1883), was sent on to some bank in Boston for collection and credit to your bank?

Defendant's counsel objects to that portion of the question which is enclosed in parenthesis, on the ground that the witness never said so.
Question modified as follows:

Q. Is it not the fact that the draft for $17,835, entered here, to which you refer, was sent by the Marine Bank to its correspondent bank in Boston for the purpose of collection and credit?
A. I don't know whether it was sent to the correspondent bank in Boston or not.
Q. Was it not sent for collection and credit?
A. It was sent for collection and credit to the Marine National Bank.
Q. To whom was it sent?

A. I presume to the Atlantic National Bank of Boston.
Q. Do you know?
A. No, sir.
Q. Is there anything on the book to show?
A. No, sir.
Q. In whose handwriting are the words and figures "November 5th, 1883," on the top of the page of this book you all call foreign cash?
A. Mr. Brooks.
Q. Who was he?
A. My assistant.
Q. When do you say you made the entry?
A. November 3d, 1883.
Q. And how far did the entries you made on that day extend?
A. I made 12 entries on page 182 of this book.
Q. There is no date opposite them?
A. No.
Q. There is no date on that page to show when they were entered?
A. Yes, sir.
90 Q. Where is it?
A. That date shows it to me.
Q. Where?
A. On the top of the page.
Q. Read the date.
A. November 5th, 1883.
Q. Is that the only date on that page?
A. Yes, sir.
Q. And you say that that shows you that you made the entry on the 3d of November?
A. Yes, sir.
Q. And there is nothing else there to show you that you did?
A. No, sir.
Q. And the entry of that date is not in your handwriting?
A. No, sir.
Q. According to the usual custom of doing business, when you made that entry did you have the original draft before you?
A. Yes, sir.
Q. When such drafts came into your possession were they endorsed on behalf of the Marine National Bank by anybody, and, if so, by whom?
A. I put on the endorsement except the signature, and the assistant cashier or the cashier or the president, as the case might be, signed it.
Q. Did he do it before or after the draft came to you?
A. After.
Q. And after the entry was made by you?
A. Yes, sir.
Q. Then, you took the draft, made the entry in the book, wrote on the draft all the endorsement to be made by the Marine Bank except the signature?

WITNESS: Or rather stamped it on and wrote out what the stamp did not supply.

Q. You had a stamp, did you say?

A. Yes, sir; with the Atlantic Bank.

91 Q. What was on the stamp?

A. Pay Atlantic National Bank or order, for collection, and credit in account.

Q. And then the president's or cashier's signature?

A. Yes, sir.

Q. And if it went to another bank you would fill in the name of the bank?

A. We had stamps for about a dozen regular correspondents; others we wrote out.

Q. And then the signature?

A. Yes, sir.

Redirect by Mr. DEVELIN:

Q. After the cashier or president signed what you had stamped on the draft you received it back?

A. Yes, sir.

Q. And you enclosed it to the bank?

A. Yes; I transmitted it by mail.

Q. There was another class of paper that came to the Marine Bank during the time you were employed there which came for collection, such as notes and bills of exchange and other paper which was received by the note teller?

A. Or myself; yes, sir.

Q. That was not the character of paper which was included in that paper?

A. It might have been.

Q. I mean this particular draft was not of that character?

A. No, sir; those went on for collection and not credited until we got the money.

Q. But this other draft you have referred to was credited immediately, before it was sent to the bank?

A. Yes, sir.

Q. Explain about the entry of that draft, on page 182—how, although the date at the head of the page is April 5th, you know that the entry was made on the 3d?

92 A. The date at the head of the page merely represents that the checks were charged against the different banks to whom they were sent on that day, while the preceding business day would be the day that they — received and sent forward.

Q. There was a Sunday intervened?

A. Either a Sunday or a holiday.

Recross-examination by Mr. BURRILL:

Q. You had no connection with this draft which you entered there until it came to your hands, did you?

A. No, sir.

Q. You had nothing to do with receiving it originally from the person by whom it was deposited?

A. No, sir.

Q. And all that you had to do, as it was out-of-town paper, was to transmit it for collection, was it not?

A. And see that we got the money back again.

Q. Those were all your duties in regard to it?

A. Well, I had other duties.

Q. What were they?

A. To see that the St. Louis and San Francisco Railway Company did not deposit too many large foreign checks as cash.

Q. Why did you do so?

A. Because I had entire charge of the foreign checks. The foreign checks are usually out five days, and that is five days' interest, and unless those concerned kept a large balance we charged them exchange, and where we paid interest on the balances we then charged interest and exchange where they kept large balances, and for that reason we watched all foreign checks deposited.

Q. For what purpose?

A. So that if they were putting in too many I would notify the officers of the bank.

Q. If you found that they were putting in larger checks than you thought ought to be put in, what would you do?

A. Go and see what their balance was, inform the assistant cashier or some officer of the bank, and receive from those orders
93 to make out a list of all checks deposited as cash for two weeks, or a month, or two months, find out how many days they had been out of them, and any exchange they would have to pay, and hand in that statement to the officers of the bank.

Q. How often have you done that?

A. Once in regard to the St. Louis and San Francisco Railway Company.

Q. When was that?

A. I cannot remember the date.

Q. You were a sort of check on the receiving teller?

A. I had nothing to do with the receiving teller in any way or shape.

Q. Whom were you a check on?

A. Not on any one. I don't understand the word "check," except it was my duty to see that there were not too many foreign checks came in.

Q. You did not regard yourself as being a check on or controlling the receiving teller in any way?

A. No, sir.

Q. Who gave you your instructions?

A. Some officer of the bank; I don't recollect who.

Q. When did you get them?

A. When I first took the position.

Q. What did he tell you?

A. He told me to watch all checks that came in and when I thought that they were depositing more than their account war-

ranted to notify him to that effect. That was all the instructions I received in regard to the St. Louis and San Francisco Railway Company.

Q. You had special instructions in regard to that company.

A. Yes; as to the St. Louis and San Francisco Railway Company and two other companies.

Q. Aside from instructions in regard to other depositors?

A. Yes, sir.

Q. What were the instructions you received in regard to the St. Louis and San Francisco Railway Company?

94 A. To see whether they were depositing many large foreign checks and how much it cost, and whether it was advisable to get exchange from them.

Q. When was it he first told you that?

A. While I was assistant note teller of the Marine Bank.

Q. How long before this transaction of May 5th, 1884, did he give you those instructions?

A. I don't remember.

Q. Have you any means of telling?

A. No, sir.

Q. Do you recollect what officer it was who gave you those instructions?

A. No, sir.

Q. Did you ever after that enforce them?

A. I do not understand the meaning of the word "enforce." I notified the officers of all large checks deposited by the St. Louis and San Francisco Railway Company.

Q. How frequently?

A. I don't remember; as often as they came in.

2d redirect examination by Mr. DEVELIN:

Q. Mr. Burrill has asked you, Did you or not simply transmit these checks, such as the one entered in that book which you have referred to, for collection, and you answered "Yes." Did you mean for collection and credit?

A. Yes, sir.

Q. As you stated before?

A. Yes, sir.

Q. How do you know that this check for $17,835, entered in the foreign cash-book, page 182, was received by the receiving teller as cash?

Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant, and on the further ground that there is no evidence of any such fact.

95 A. The total footing of all checks received on one day had to agree with the amount of the foreign checks handed over to the paying teller by the receiving teller, as the paying teller's cash would not prove without this charge.

Q. That is, without this amount?

A. Yes, sir.

Q. When you stated that the St. Louis and San Franciso Railway Company deposited large checks you meant foreign checks, did you not?

A. Yes, sir.

Q. You stated that on one occasion the bank charged either exchange or interest against the St. Louis and San Francisco Railway Company?

A. I made out a statement of the checks that they had deposited, and put opposite each one the time we were out of the money and exchange, if any, and handed it to an officer of the bank.

Adjourned to May 26th, 1882, at 3 o'clock p. m.
Adjourned to May 28th at 3 o'clock p. m.
Adjourned to June 2d, 1885, at 1885, at 3 o'clock.

JUNE 2D, 1885.

Parties met pursuant to adjournment.

Present: John E. Burrill, Esq., for plaintiff; John E. Develin, Esq., for defendant.

THOMAS W. LILLIE, recalled on behalf of defendant, testified as follows:

Redirect examination by Mr. DEVELIN:

Q. Mr. Lillie, do you know a gentleman named G. L. Goodwin?

A. By correspondence; yes.

96 Q. Where did he do business in 1883?

A. Boston.

Q. Did your road have transactions with him during that year in the way of sending him money or getting money from him?

A. No, sir.

Q. Did the plaintiff draw a check or bill or paper of some kind on him in the month of November, 1883, for $17,835?

Objected to by plaintiff's counsel as irrelevant and immaterial and otherwise improper.

A. Yes.

Q. What was it you drew?

Like objection by plaintiff's counsel.

A. A draft.

Q. At sight?

A. Yes.

Q. Did you draw on him individually or in a representative character?

A. In his official capacity.

Q. What was he?

A. Assistant treasurer of the Atchison, Topeka and Santa Fé Railroad Company.

Q. I show you deposit ticket dated November 3d, 1883, marked

"Ex. C, April 27, '85." Is the "17,835" entered on that deposit ticket the same — which you have spoken a moment ago?

(Paper shown witness.)

Like objection by plaintiff's counsel.

A. Yes.

Q. I show you the pass-book of the plaintiff's with the Marine Bank, under date of November 3, 1883, where appears this
97 entry, "Nov. 3, 17,860," and ask you whether that "17,860" was made up in part of this draft for $17,835 of that date.

(Book shown witness.)

Like objection by plaintiff's counsel.

A. Yes, sir.

Q. I show you deposit ticket, dated May 5, 1884, being Exhibit B, April 27th, 1885, upon which had been deposited draft for $17,835, and ask you was that draft drawn by the plaintiffs upon the same party for the amount of $17,835?

(Ticket shown witness.)

A. Yes, sir.

Q. Was that draft drawn at sight?

A. Yes, sir.

Q. I see that on November 3, 1883, and on May 5th, 1884, about six months apart, you drew on Mr. Goodwin in his official character for the same amount; was there any arrangement or dealing by which he was to pay plaintiff every six months that amount?

Like objection by plaintiff's counsel.

A. No, sir.

Q. How was it otherwise that the amounts were exactly the same?

Objected to by plaintiff's counsel as irrelevant, immaterial, and incompetent, as seeking to pry into transactions between plaintiff and other parties with which the defendant has no interests, and, if the question is insisted upon, plaintiff's counsel advises the witness not to answer it.

Defendant's counsel insists upon the question. Witness, by advice of plaintiff's counsel, refuses to answer.

Plaintiff's counsel notifies defendant's counsel that if he
98 has any further questions to ask the witness he must ask them now, as plaintiff's counsel will refuse to allow the witness to be produced here again except under order of the court.

On refusal of the witness to answer defendant's counsel asked for an adjournment, and, by consent, further hearing was adjourned until June 10, 1885, at 3 o'clock.

Further adjourned to June, 1885, at 3 p. m.

Hearing of June 10, 1885, three o'clock p. m.

Appearances of counsel: For the plaintiff, J. E. Burrill, Esq.

No one appearing for the defendant, Mr. Burrill stated that he

had not received any notice of motion to compel Mr. Lillie to answer the question objected to, and that he supposed that Mr. Develin was not ready.

The further hearing was adjourned to June 15th, 1885, at three o'clock p. m.

Hearing of June 15th, 1885, at three o'clock p. m.

The examiner and Mr. J. E. Burrill attended, and after waiting nearly half an hour a gentleman appeared from Mr. Develin's office and stated that he (Mr. Develin) was not ready to go on and asked for an adjournment. The examination was then adjourned to June 18th, 1885, at three o'clock p. m. Mr. Burrill stated that if Mr. Develin was not ready to go on at that time with witnesses on his behalf that he (Mr. Burrill) would examine witnesses on
99 plaintiff's behalf. No objection was made to this arrangement, but it was acquiesced in, as the examiner understood.

Adjourned to Thursday, June 18th, 1885, at three o'clock p. m.

Hearing of Thursday, June 18, 1885, three o'clock p. m., at the office of Mr. J. E. Burrill, Mills building.

Appearances of counsel: For the plaintiff, J. E. Burrill, Esq.; for the defendant, John E. Develin, Esq.

Mr. DEVELIN: I object to any testimony being taken or any witness being sworn while there is a witness under examination. I also move to correct the minutes wherein they state that I called Mr. Lillile on behalf of the defendant. I did not call him on behalf of the defendant; I called him for further cross-examination. I would state further that this further cross-examination became necessary because of facts ascertained after he was on the stand the last time, such cross-examination being in regard to matters in relation to which he had testified before.

Mr. BURRILL: I object to the correction of the minutes in that regard on the ground that Mr. Lillie was called by defendant's counsel as his witness, his cross-examination having been closed many meetings ago; further, the taking of testimony was adjourned to last Monday, at which time defendant's counsel was represented, and an application made for an adjournment; it was then and there agreed that if Mr. Develin had no witnesses to examine to-day
100 Mr. Burrill should go on and examine witnesses on his part. In accordance with that agreement Mr. Burrill has procured the attendance of witnesses, and desires to examine them.

Mr. DEVELIN: I deny any such arrangement, and it does not appear on the minutes; and the same objection was then made to the taking of any testimony or the swearing of any witnesses until the examination of the witness on the stand was concluded.

The REFEREE: On Monday, the 15th inst., Mr. Burrill and a clerk from Mr. Develin's office were present, at which time the hearing was adjourned until to-day, with the understanding that Mr. Develin should be present with witnesses; if not, Mr. Burrill would procure witnesses on his own behalf, who would be examined.

Mr. DEVELIN: I desire to have it entered that that statement is made from the recollection of the referee, and not from the record. I shall take no part in this examination, but shall withdraw. In regard to the adjournment I want time enough to have my order decided as to Mr. Lillie's answering the questions which he declined to answer; if the order is granted I shall examine him; if it is not I shall waive my objection made to-day and at the last meeting. I ask the examiner to take that into consideration, as the same objection applies to Mr. Johnson and Mr. Baldwin, who are to be here to-day on behalf of the plaintiff.

Mr. Develin then withdrew.

101 WILLIAM A. CAMP, called on behalf of the plaintiff, being duly sworn, testifies as follows:

Examined by Mr. BURRILL:

Q. What was your occupation in the month of May, 1884?

A. I was manager of the New York clearing-house.

Q. How long had you been such manager?

A. Nearly twenty years.

Q. Was the Marine National Bank at that time a member of the clearing-house?

A. It was.

Q. Who was the president of that bank in the early part of May, 1884?

A. James D. Fish.

Q. How long had he been such president?

A. I can't answer exactly.

Q. For a number of years?

A. Yes; many years; I think for over twenty years; I could not say positively; not here.

Q. As manager of the clearing-house, have you general charge and superintendence of the clearances between the different banks, members of the association?

A. I have.

Q. Are you able to state what the balance of the Marine Bank was in its dealings with the clearing-house after the clearances on the morning of the 6th of May, 1884? If so, state it.

A. I can, in round numbers.

Q. State whether the balance was in favor of the Marine Bank or against it, and give the amount of the balance.

A. They were a debtor at the clearing-house for 555,000 and some odd hundred dollars, which I can't remember; that was the balance against the Marine Bank.

Q. At what time was the clearing made on the morning of that day?

A. At ten o'clock it commenced.

102 Q. How soon after that did you find out what the balance was?

A. About eleven minutes after ten.

Q. Was Mr. Fish at the clearing-house that morning?
A. Yes, sir.
Q. Did you have any conversation with him at that time?
A. Yes, sir.
Q. State what took place between you and him.
A. He came to the clearing-house at about ten o'clock, having, as I learned afterwards, been there previously to see me. He said to me that he had been pretty heavily drawn upon by his depositors, and consequently his reserve was below twenty-five per cent. considerably—the legal reserve required by the banking law. He asked me if I could help him to get a loan of about $400,000 for a short time to make his legal reserve good under the national banking law. I replied that if he had the right kind of securities I could do it for him. I kept him in conversation for a few minutes, because my suspicions were aroused that things might not be correct, until I could ascertain how he stood at the clearing-house. I excused myself a moment and went up into the clearing-room, and went to the desk of the Marine Bank and saw his clerk just completing the footings of his sheet, and I saw at once that the debit balance was the sum of $555,000, or a little more than that. I immediately directed the messenger of the Marine Bank, who was putting his exchanges into his box, to come with me down to my office. When we got there I took his box from him and went into the room where Mr. Fish was, my own inner office, and put it under the desk. I then said to Mr. Fish that he was indebted to the clearing-house $555,000, and that under the circumstances I could not allow the exchanges to go to the bank until he had paid his debit balance. He replied that there was not so much money in the bank. I said,
"Give me an order on the cashier for what he has got and
103 to send me up securities, collateral upon which I could raise the money for the balance." He says, "Is that the proper thing to do?" "Most assuredly," I said: "you can't get your exchanges until you do it." He immediately sat down and wrote an order to his cashier—I did not see what he wrote—but he sent a messenger down, who very soon returned with $210,000 in money, legal-tender notes, I think, and his pocket-book with all the bills receivable of the bank. I immediately sent for my clearing-house committee, which consisted of five bank officers, to advise me and act for me.
Q. Was the balance due the clearing-house paid that morning; and, if so, how was it paid?
A. It was paid in cash, $210,000, and a short time afterwards a further amount of cash, amounting to $345,000.
Q. How was that last $345,000 obtained; on what?
A. That was raised upon collaterals of the bank which had been sent up.
Q. In the manner which you have stated?
A. They sent up the bills receivable, and then sent up collaterals.
Q. What became of those collaterals?

A. I passed them over to the clearing-house or they took them. I don't know that there were any passing over about it.

Q. What I want to get at is how you passed them over; who furnished the money? You passed them over to the parties who furnished the money?

A. Yes, sir.

Q. That ended your transaction?

A That settled the balance with the Marine Bank.

Q. Those exchanges which you spoke of that the messenger had, what were they?

A. They were checks upon that bank which had been presented in other banks.

Q. They were checks drawn by depositors on deposits in the Marine Bank which had come into other banks?

A. Yes, sir; deposited in other banks.

104 Q. How did you know that the collaterals which were sent up by the Marine Bank on the morning of that day to the clearing-house were all the securities of the bank? I understood you to say that they sent up the pocket-book containing all the collaterals?

A. They sent up the pocket-book with all the bills receivable; but the collaterals—what we call collaterals were securities for their call loans—which were sent up later, because the bills were not as available to raise money upon as collateral securities. I don't know what they were.

Q. What I want to know is this: What were those vouchers, I will call them, which were sent up by the Marine Bank, as you have stated, for the purpose of raising money to pay the balance of the indebtedness to the clearing-house?

A. The first lot were bills receivable; the notes that they had taken and discounted, the property of the Marine Bank; the next lot were the collaterals, I suppose, to their called loans; I did not examine those; I was not familiar with those.

Q. Why was the second batch of collaterals sent up?

A. Because Mr. Baldwin and these gentlemen who came there as a committee said to Mr. Fish, "Where are your collaterals for your called loans?" He said, "They have not come up." Mr. Baldwin or Mr. Fish stated that that they would come up, and he sent an order for them and they came up.

Q. Were the securities which were used to raise the $345,000 the bills receivable and also the collateral for the call loans?

A. I had selected a portion of those bills receivable before the committee came there. The committee used a portion of the bills receivable and a portion of the call-loan collaterals.

Q. What time of the day was it that the bills receivable came there to the clearing-house, as you have stated?

A. I should think not later than twenty minutes past ten.

Q. Who brought them up?

A. The messenger from the bank; I think Mr. Daboll.

105 Q. What time did the call-loan collaterals come there?

A. I should think fifteen or twenty minutes later, but I could not swear positively to the hour.

Q. When did you first hear, on the morning of the 6th of May, that the doors of the Marine Bank were closed?

A. I could not say exactly; I don't think I heard of it until twelve o'clock, although I have been told that I heard of it before then.

Q. You have no particular recollection on that subject?

A. No; I was pretty busy that morning; I was not counting the time so much.

OCTAVIUS D. BALDWIN, called on behalf of the plaintiff, being duly sworn, testifies as follows:

Examined by Mr. BURRILL:

Q. What position do you hold at present?

A. I am president of the Fourth National Bank.

Q. Were you such in May, 1884?

A. On the 6th of May; yes, sir.

Q. Were you at the clearing-house on the morning of the 6th of May, 1884?

A. Yes, sir.

Q. What time did you get there?

A. About quarter past ten.

Q. Were you sent for especially?

A. I received a message that Mr. Camp wanted to see me.

Q. Did you find Mr. Fish there?

A. Yes, sir.

Q. What, if anything, took place?

A. Mr. Camp informed me that Mr. Fish had called and stated that he feared that his bank would come a large debtor on balance with the exchanges, and he wished, if possible, to get a loan in order to keep his reserve good. I said that if he had proper securities he could get a loan, and asked how much he wanted. He replied that he could not tell quite yet, but probably about $400,000. I spoke to Mr. Fish——

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Q. Was Fish present?

A. Mr. Fish was present.

Q. And heard this conversation?

A. I cannot swear about that; there were three of us, about as far apart as we are.

Q. He was near enough to hear it?

A. He might have heard it.

Q. What did you say to him?

A. I asked him if the bank was all right, and if he got the loan there would be any further trouble. He said yes, if he could get assistance to get through that morning, the bank was all right and sound. I said, "If the collateral is all right I will make the loan." The bills receivable were brought up, and several other gentlemen sat down to the table and assisted me to select such as we thought were good and would be ample for the security. While they were doing that I spoke to Mr. Fish and asked him if he didn't have some call-loan collateral. He said yes, he had a large amount. I

said he had better send for those; we could pick those out very much quicker, and we could give him back a lot of bills receivable in place of them. I suppose he sent for the call-loan collateral; at any rate, they were brought to the clearing-house. We took what we had selected from the bills receivable and added to them from the collaterals, and when I had sufficient collaterals to secure the loan I intended to make I gave him the money which I had agreed to loan and sent the collaterals over to the bank.

Q. How much did you furnish?

A. $345,000, some odd dollars, which I don't positively remember.

Q. Did you state the balance against the Marine Bank?

A. I did not.

Q. What was it?

A. It was stated to be a debit of $555,000.

Q. Do you know how the residue was paid?

A. There was $210,000 brought up with the bills receivable, which was there and paid in.

107 Q. When you speak of call loans sent up you mean collaterals?

A. I mean the call loans which included the collaterals.

Q. Do you know anything about a check for about $210,000, which had been drawn on the First National Bank and which went into the credit of the Marine Bank?

A. There was no check of $210,000; there were three checks amounting in all to $215,000.

Q. What checks were they?

A. They were checks drawn by Ferdinand Ward on the First National Bank.

Q. And deposited where?

A. That I can't say. The cashier of the First National Bank brought them to the clearing-house and said that they had been found in the package of the exchanges of the Marine Bank against the First National Bank.

Q. Do you know what became of them; were they thrown out?

A. Mr. Scofield said that he had taken them down to the Marine Bank and demanded the money on them, according to the clearing-house rules, and he could not get it.

Q. What time was that?

A. I think that was about twelve o'clock; it was about just after the entire completion of the exchanges. I know we were just going home.

Further hearing adjourned to Monday, June 29, 1885, at three o'clock p. m., at the office of the referee, 55 Broadway, New York city, at which time Mr. Devlin will be prepared to go on or have Mr. Lillie answer the question which he declined to answer by producing an order of the court to that effect.

108 Hearing of October 6th, 1885, at 12 o'clock m.

Owing to the illness of Mr. John E. Develin, the hearing was adjourned to Friday, October 9th, 1885, at 2 o'clock.

Hearing of Friday, October 9th, 1885, 2 o'clock p. m.

Owing to engagements of Mr. Develin, the hearing was adjourned to Thursday, October 15th, 1885, at 2 o'clock p. m.

Hearing of Thursday, October 15th, 1885, at 2 o'clock p. m.

Owing to the professional engagements of Mr. Develin, the hearing was adjourned to Tuesday, October 20th, 1885, at 3 o'clock p. m.

Hearing of Tuesday, October 20th, 1885, at 3 o'clock p. m.

Owing to the engagements of Mr. Develin, the hearing was adjourned to Thursday, October 22d, 1885, at 2.30 p. m.

Hearing of Thursday, October 22d, 1885, 2.30 p. m.

Appearance of counsel: George Zabriskie, Esq., for plaintiffs; John E. Develin, Esq., for defendant.

T. W. Lillie, present in obedience to a subpœna served upon him by defendant's counsel, as plaintiffs' counsel had stated that he would not be again produced by plaintiffs.

Defendant's counsel gives memorandum of certain extracts that he desires witness to produce at the next hearing.

Further hearing adjourned to Wednesday, October 28th, 1885, at 2.30 p. m.

109 Hearing of Wednesday, October 28th, 1885.

Hearing adjourned, by consent, on account of the absence of the witness, Mr. Johnson, who was engaged as a witness in court, to Friday, October 30th, 1885, at 2.30 p. m.

Hearing of Friday, October 30th, 1885, at 2.30 p. m.

Same appearances of counsel.

Memorandum of further extracts from check-books was given to Mr. T. W. Lillie by Mr. Develin, to be produced at the next hearing.

WALTER S. JOHNSTON, called on behalf of the plaintiffs, being duly sworn, testifies as follows:

Examined by Mr. ZABRISKIE:

Q. Are you the defendant?
A. Yes.
Q. When were you appointed the receiver of the Marine Bank?
A. The thirteenth of May, 1885.
Q. Have you been in possession of the assets of the institution ever since?
A. Yes, sir.

Q. What have you found its condition to be on the sixth of May, 1885?

A. It was insolvent.

Q. Had its condition altered between the 1st and the sixth of May?

A. Considerably.

Q. In what respect?

A. The overdrafts of the firm of Grant & Ward, and of Ferdinand Ward.

Q. How much did they amount to?

A. I got a judgment against them of seven hundred and thirty-odd thousand dollars; something like that.

Q. When were those overdrafts made?

110 A. They occurred in the last two or three days in one account, and had been running for two or three weeks in the other account.

Q. How much of it occurred within the last two or three days?

A. I can't tell; I have a schedule of it if you would like to have it.

Q. I only want to get at it in a general way.

A. I am trying to recall. There was the Grant & Ward special account, as it was called, that was used for these Government contracts; then there was the Grant & Ward general account; then there was Ferdinand Ward's individual account. The Ward individual account was overdrawn some $130,000 or $140,000, and that occurred from the third to the sixth of May, up even.

Q. How much of it occurred before the fifth of May?

A. He was overdrawn in his individual account on Saturday night—that is, the third, $139,000, in round numbers; on Monday, the fifth, he drew the checks on Warner of $152,000. He put in on the fifth the $150,000 that he got from Vanderbilt, which was good, and he put in $156,000 on the First National, which was fraudulent and refused. How does that leave the account?

Q. That would leave the account overdrawn $140,000?

A. That is about what I gave as his overdraft. Then, in the general account of Grant & Ward that was overdrawn, as I now recollect it, pretty nearly the whole of it was one check, of three hundred-odd thousand dollars, which went to this New York, Buffalo and Philadelphia Railroad Company. That check came in and overdrew that account.

Q. When did that come in?

A. On the last day. It came in through the exchanges, but it came in the day before. The Grant & Ward account, which was used in this contract business, had been overdrawn two or three weeks; it ran back to April 12th or 15th; it kept growing and growing until it wound up with about $350,000.

111 Q. On Saturday night?

A. On Tuesday, the 6th of May.

Q. How much was it on the Saturday night before?

A. Pretty nearly the same amount, I guess. Of course, those overdrafts without securities was an enormous draft on the resources

of the bank, and made, as your question indicated, considerable difference between the situation on and after Tuesday from what it was a few months before.

By Mr. DEVELIN:

Q. Or the day before?
A. A few days before, to the extent that you can measure.

By Mr. ZABRISKIE:

Q. You say that the overdrafts between Saturday night, the 3d of May, and Tuesday morning, the 6th of May, as I understand it, amounted to $141,000 in the Ferdinand Ward account, and $300,000 in the Grant & Ward account?
A. Yes, sir; and $350,000 in the Grant & Ward special.
Q. $350,000 previously overdrawn?
A. Yes; I think most of it was before Saturday. I would like to look at the schedule to be correct. I can give it to you.
Q. Is it the fact that the solvency of the bank depended only upon these overdrafts of $300,000 and $141,000?
A. No.
Q. Was the bank insolvent without reference to those overdrafts?
A. Yes.
Q. The bank was, then, insolvent on the third of May—Saturday?
A. Yes.
Q. That appears by the books and accounts and assets of the bank?
A. On my estimates of the values. You know, in a bank, the liabilities and resources balance on the books; it is the estimates, of course, that make it insolvent, and the bank is just those overdrafts worse off and yet insolvent, because, as you will observe, my official estimate when I took charge was that the bank could not pay
112 its debts by a difference between, say, 65 per cent. and par, which is about 35 per cent.—the debt being in the neighborhood of five millions; that makes a deficiency of over a million and a half.
Q. In arriving at the conclusion that you have just stated, have you estimated the assets of the bank at what they were actually worth and not at their face value?
A. At their actual worth.

Cross-examination by Mr. DEVELIN:

Q. By the face value the bank was solvent up to Monday?
A. I don't remember.
Q. When the bank closed on Monday the private account of Ferdinand Ward was not overdrawn?
A. He came early in the morning and brought that $150,000.
Q. That made his deficiency good which existed on Saturday—$11,000?
A. Yes; but you must understand, though, that one of the checks which go to make up the $152,000—the Warner checks, to wit,

$81,000—was certified on Saturday, and should have been charged on Saturday; but it was certified after banking hours, and hence the book-keeper did not charge it until Monday.

Q. Then, on Monday, the account was overdrawn, the difference between the surplus of the $150,000 and the Warner certified check on Saturday?

A. Let me make that clear to you: There was $139,000 on Saturday overdrawn——

Q. That did not include the certified check?

A. No. Now, on the same day (Saturday) he put in one of the fraudulent checks on the First National for $80,000, but he requested the receiving teller not to put it through the exchanges, because the check which he had given Warner would not be presented; so that when you leave out Monday morning the account stands overdrawn on the face of things, as you will observe, $139,000, with a
113 credit of $81,000 not yet made absolute; but on Monday morning through the exchanges came the $81,000.

Q. On Monday morning?

A. Yes; this $81,000. Then they put through this other check of $80,000. Then he drew the account in favor of Warner for $71,800, and at the same time presented another fraudulent check on the First National, together with the $150,000 from Vanderbilt, for $75,000. The difficulty is to distinguish just how it is.

Redirect examination by Mr. ZABRISKIE:

Q. How long had the bank been insolvent?

A. I could not say, as to the matter of time; but I should say, in a general comment, that it was insolvent from the time that its indebtedness alone from Grant & Ward, considering them insolvent always, grew to such a point that if not paid would have caused the bank to be put in such a condition that it could not pay its debts on demand. I cannot fix that time, but it must have been at such a time, you observe, when the loan of Grant & Ward, they being insolvent, though not known to be so, but being insolvent in point of fact, had grown to such a figure that if called and not paid the bank could not meet its obligations, because this represented loans, and they could not refund the money.

Q. That condition of things had lasted for several months back, as it now turns out?

A. I presume the bank had been insolvent in point of time for a year back.

Q. The president of the Marine Bank was James D. Fish?

A. Yes.

Q. Was he not also a partner of Grant & Ward?

A. Yes, sir.

By Mr. DEVLIN:

Q. This estimate of yours about the bank being insolvent for a year is based on facts which came out after the bank closed?

A. Certainly.

114 Q. It was not yet known to anybody, so far as you know, that the bank was insolvent so long back?
A. Certainly not. I had no idea of it.

Further hearing adjourned to Friday, November 6th, 1885, at 2.30 p. m.

Hearing of Friday, November 6, 1885, 2.30 p. m.

Hearing adjourned by consent to Wednesday, November 11th, 1885, at 2.30 p. m.

Hearing of Wednesday, November 11th, 1885, 2.30 p. m.

Same appearances of counsel.

T. W. LILLIE, present in obedience to previous subpœna, referred to on page 173, testifies as follows:

Examined by Mr. DEVLIN:

Q. On your pass-book there appears an entry as of May 5, 1884, of a deposit of $17,835. That was drawn by the plaintiffs on the assistant treasurer of the Atchison, Topeka and Santa Fé, in Boston?
A. Yes, sir.
Q. That is a deposit in suit?
A. Yes, sir.
Q. Was it a check or a draft?
A. It was a draft.
Q. A sight draft, payable at sight?
A. Yes, sir.
Q. Here is a deposit of August 23d, 1883, and this only runs from April 1, 1884?
A. That is only a portion of the pass-book; that is all I supposed you wanted.

115 Defendant's counsel calls upon plaintiffs' counsel to produce the stubs of checks drawn by plaintiffs on the Marine National Bank during the years 1883 and 1884.

Q. You have that copy with you from the stubs?
A. Yes, sir; I took a memorandum of what you wanted, and the copy is in lead pencil, from the check-book of the Marine Bank, November 1, 1883, to the 5th, and from August 1, 1883, to the 31, and those I have here.
Q. On August 23, 1883, is there entered as a deposit the sum of $4,771.66?
A. Yes, sir; that is a copy of the words and figures on the stub of the check-book.

Further hearing adjourned to Thursday, November 12, 1885, at 2.30 p. m. to enable the witness to procure the information desired by Mr. Devlin.

Hearing of Thursday, November 12, 1885, 2.30 p. m.

Same appearances of counsel.

T. W. LILLIE, continuation of the examination by Mr. DEVLIN, testifies as follows:

Q. I produce a paper marked an exhibit for identification and hand it to you and ask you what it is.

A. Transcript from the check-book of the St. Louis and San Francisco Railroad Company on the Marine National Bank from the 31st July to August 31st, 1883; from October 31, 1883, to November 3, 1883; the next page is the same; from April 2d, 1884, to and including May 5th, 1884.

Q. You say that this is a transcript from the check-book. These figures which appear upon it are the amounts of balances and deposits made during the periods that are here mentioned, are they not?

116 A. They are copies of all the figures appearing on the left of the check-book; some of them are footings, and footings carried over and entries made of things sent to the bank.

Q. Deposits?

A. Yes, sir.

Q. They show the amount of money from time to time on deposit in the Marine Bank to the credit of the plaintiffs, do they not?

A. You mean the balances?

Q. They don't show the balances, but they show the amount at different times on deposit; or I would like to know what they do show.

A. They show the figures.

Q. What do the figures show?

A. The figures show—or the figures are the footings at the top and bottom of each page, and the deposits.

Q. The footings are the balances, are they not?

A. No, sir.

Q. What are the footings?

A. The balances would be the footings on the other side deducted, but that is not shown.

Q. Then, these are the balances less the footings on the other side of the book?

A. Not less, because if they were less they were taken out before, which is not the case. We don't strike balances that way.

Q. These figures represent the grand totals of the deposits during this period?

A. Yes, sir.

It is stipulated and agreed between counsel that the copies here produced of the check-book are to be used the same as if the originals were produced.

Paper marked Defendant's Exhibit G, November 12, 1885.

Q. I show you a deposit ticket dated August 23d, 1883, and ask

you if that is one of the deposit tickets used by the plaintiffs in making deposits in the Marine Bank.

117 A. Yes, sir.

Q. I show you Exhibit G, of this date, and call your attention to the words and figures August 23, E. P., $4,771.66, and ask you if that is the sum of money that is mentioned in the deposit ticket which you had in your hand.

A. Yes, sir.

Deposit slip marked Defendant's Exhibit H, November 12, 1885.

Q. I call your attention to the pass or bank book between plaintiffs and the Marine Bank, in which are entered the deposits, and ask you to look at the date August 23d, 1883, and state does that deposit appear on that book as having been made on that day.

A. $4,771.66; yes, sir.

Q. Is that the same $4,771.66 that is mentioned in the deposit ticket, Exhibit H, and the transcript from your check-book, Exhibit G?

A. Yes, sir; the same one.

Q. Can you tell me of what sums or in what form that was made up by looking at that in any way?

A. The item of $4,750 was a draft or check, I don't know which, on Lowell.

Q. Of the plaintiffs'?

A. No; it wasn't ours; it was a draft, I know, given to us.

Q. Can you remember who it was?

A. C. W. Rogers.

Q. On a bank in Lowell?

A. On C. W. Rogers.

Q. On a bank in Lowell or on an individual banker or bankers in Lowell, Mass.?

A. Yes, sir.

Q. It was endorsed by the plaintiffs and deposited to their account?

A. Yes, sir.

Q. I call your attention to a deposit ticket, dated August 27, 1883, and marked Exhibit E, April 27, 1885, by which it appears that $9,050 was deposited by the St. Louis and San Francisco Rail-

118 road Company, the plaintiffs, in the Marine National Bank, on August 27. State whether that is correct or not.

A. Yes, sir.

Q. That was a deposit made by the plaintiffs in the Marine Bank on that day?

A. Yes, sir.

Q. Turn to your pass or bank book on the same day, and state what figures are there.

A. The same figures.

Q. The same figures on the same date?

A. Yes, sir.

Q. Representing the same deposit?

A. Yes, sir.

Q. Turn to Exhibit G. I call your attention to the words and figures August 27: D. P., $9,050. Is that the same $9,050 mentioned in the bank book and in that deposit slip, Exhibit E?

A. Yes, sir.

Q. Can you tell me of what items that deposit was composed?

A. $9,000 of that sum was similar in character to the last; it was a check or draft on Lowell which one of the Rogers gave; which, I don't remember now.

Q. It was endorsed by the plaintiffs and deposited to their account?

A. Yes, sir.

Q. I call your attention to the deposit slip or ticket marked Exhibit D, 1885, of the St. Louis and San Francisco Railroad Company, of the Marine Bank, upon which it appears opposite the word check, $18,930. State whether that represents a deposit in the Marine Bank on that date by the plaintiffs.

A. Yes, sir.

Q. Does that same deposit appear upon the plaintiffs' pass-book on the Marine Bank?

A. Yes, sir.

Q. The same day and the same amount?

A. Yes, sir.

Q. Does it appear on the transcript from your check-book, Exhibit G?

A. That is the same thing.

Q. All three are the same deposit?

119 A. Yes, sir.

Q. Can you tell of what that deposit was composed?

A. I can't tell that; I don't know about it; I have not looked it up.

Q. Would you take it down and send me a note under Mr. Zabriskie's observation, and I will incorporate it?

A. Yes, sir.

Q. Yes, sir; I will have to look that up.

Q. That $18,930, whatever it may be, mentioned upon the deposit slip, appears also on the transcript from the stubs, April 10, 1884?

A. Yes, sir.

Q. This April 10, 1884, that is the same sum?

A. Yes, sir; the same.

Q. I show you Exhibit G, April 27, 1885, being also deposit slip of the St. Louis and San Francisco Railroad Company, on the Marine Bank, dated May 5, 1884, reading, checks, $17,835. That was a deposit, was it not?

A. Yes, sir.

Q. And is that same deposit mentioned in the transcript of stubs, in these words and figures: 1884, May 5, checks, $17,835?

A. Yes, sir.

Q. Mentioned also in your pass or bank book?

A. It was entered by the receiver of the bank.

Q. Is it entered there?

A. Yes, sir.

Cross-examination by Mr. ZABRISKIE:

Q. In speaking of deposits, do you mean any more than that the paper said to be deposited was sent to the bank to be treated for collection or for cash, as the case might be, which might be drawn against?

A. No; I do not mean anything more than that.

Q. Not all to be treated as cash?

A. No, sir.

Q. Was there any agreement between the bank and the railway company by which paper deposited for collection was treated as cash, subject to draft by the St. Louis and San Francisco Railway Company?

A. No, sir.

120 By Mr. DEVELIN:

Q. When you say there was no agreement you mean that you had no specific agreement, verbal or in writing, on that subject?

A. Yes, sir.

Q. That is all you meant by that?

A. I suppose that that is all I meant.

Plaintiff's counsel offers in evidence the stipulation under which money was sent to Boston, marked "Plaintiff's Exhibit 1, November 12, 1885." The paper produced by plaintiffs' counsel is endorsed Walter S. Johnston, receiver of the National Marine Bank and the St. Louis, San Francisco Railroad Company. Request to withdraw notice to Atlantic National Bank of Boston. It is admitted that the signature at the foot of the paper is the signature of the defendant herein.

Q. Do you know when this was executed—the date?

A. I could not say; I think I could verify very nearly the date by letters at the office connected with the business.

Q. Is this the paper or the agreement in pursuance of which the funds which were attached in the Atlantic National Bank in Boston were allowed to be paid over to the defendant?

A. No doubt about it; this is the paper which was taken when the notice was withdrawn.

Q. This is the paper under which the notice was withdrawn?

A. Yes, sir.

Testimony closed.

Mr. Develin states that he had not read the testimony fully, and that he has no further testimony to introduce; but if on reading it he finds that he has omitted something he will ask leave to put it in.

121 PLAINTIFF'S EXHIBITS.

EXHIBIT A.

St. Louis & San Francisco Railway Co., Mills building, 18 Broad street.

(Dictated.) NEW YORK, *May* 17, 1884.

Receiver Marine National Bank.

DEAR SIR: On the afternoon of Monday, the 5th inst., this company deposited for collection in the Marine Bank, sight draft, T. W. Lillie, treasurer, on G. L. Goodwin, ass't treas. Atchison, Topeka & Santa Fé R. R. Co., Boston, for $17,835. The returns for this draft were not received by the Marine Bank until subsequent to its failure.

This company claims that it is entitled to the proceeds of the said draft. Please let me know whether this claim will be recognized by you.

Yours respectfully, T. W. LILLIE,
Sec. & Treas.

EXHIBIT B. Feb. 11, '85.

Marine National Bank, 78 & 80 Wall street.

NEW YORK, *May* 17, 188–.

T. W. Lillie, Esq., sec'y & treas.

Your favor of this date received.

122 The draft you speak of is to our credit in the Atlantic National Bank of Boston in our general credit balance there. This bank has been advised that that balance has been attached by the Everett National Bank of Boston. I intend to write to-day to ascertain the position of these matters in Boston.

Yours resp'ly, WALTER JOHNSTON,
Receiver Marine Nat'l Bank.

EXHIBIT 1.

Walter S. Johnson, receiver of the Marine National Bank, requests the St. Louis and San Francisco Railway Company to withdraw the notice which it has caused to be served upon the Atlantic National Bank of Boston, and upon which that bank has refused to pay over to the receiver the proceeds of the railway company's draft, dated May 5, 1884, upon G. L. Goodwin, Esq., assistant treasurer Atchison, Topeka and Santa Fé Railroad Company, Boston, Mass., in favor of the Marine National Bank for $17,835, upon the following conditions, which the receiver agrees to:

1. The railway company's contention that neither the draft nor its proceeds are the property of the Marine Bank or of the receiver, and that it is entitled to follow the proceeds and collect them in preference to any claim of the receiver or of other parties upon

them, is not prejudiced by the withdrawal of the notice or by the payment to or collection by the receiver of the proceeds; and if the railway company's contention be sustained by the court the entire proceeds of the draft are to be paid over to it without any defense or diminution growing out of their passing out of the possession of the Atlantic Bank or their coming into the hands of the receiver.

2. Notwithstanding its said contention the railway com-
123 pany may prove the amount of said draft as a general debt against the Marine National Bank, and neither such proof nor any proof heretofore made, nor the receipt of dividends, nor any other thing heretofore or hereafter done under such proof or proofs shall prejudice the railway company's contention above mentioned or defeat any rights which it has had since the 5th of May, 1884, in respect to said draft or the proceeds thereof, nor shall anything done in pursuance of this stipulation have that effect.

WALTER S. JOHNSTON, *Receiver.*

124 DEFENDANT'S EXHIBITS.

EXHIBIT B.

Deposited by St. Louis and San Francisco Railway Co. in the Marine National Bank May 5, 1884.

Checks	$17,835

EXHIBIT C.

Deposited by St. Louis and San Francisco Railway Co. in the Marine National Bank Nov. 3, 1883.

Checks	$17,835
	25
	$17,860

EXHIBIT D.

Deposited by St. Louis and San Francisco Railway Co. in the Marine National Bank Ap'l 10, 1884.

Checks	$18,930

125 EXHIBIT E.

Deposited by St. Louis and San Francisco Railway Co. in the Marine National Bank Aug. 27, 1883.

Checks	$9,000
	50
	$9,050

EXHIBIT H.

Deposited by St. Louis and San Francisco Railway Co. in the Marine National Bank Aug. 23, 1883.

Checks	$21 66
	4,750
	$4,771 66

EXHIBIT F.

James D. Fish, president; John D. Fish, cashier; Ambrose Snow, vice-president; N. D. Daboll, ass't cashier.

MARINE NATIONAL BANK, NEW YORK, ——, 188-.

—— ——, Esq., cashier.

DEAR SIR: Your favor of — received. I inclose as stated below.

Respectfully, JOHN D. FISH, *Cashier*.

126 Please return as promptly as possible all unpaid collections protested, unless marked thus ×, when please return without protest.

? Please advise payment.

EXHIBIT G.

Transcript from the check-book of the St. Louis & San Francisco Railway Company with the Marine National Bank from July 31st, 1883, to August 31st, 1883.

The following are entered on the left-hand side of the check-book:

1883.

July 31st	$71,056 24
Aug. 1st, dep.	75,000 00
	$146,056 24
	146,056 24
" 2d, dep.	8,400 00
	$154,456 24
	154,456 24
" 7th, dep.	50,000 00
	$204,456 24
	204,456 24
" 10th, dep.	100 00
	$204,556 24

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WALTER S. JOHNSTON, *Receiver.*

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	$154,456 24
	154,456 24
" 7th, dep.	50,000 00
	$204,456 24
	204,456 24
" 10th, dep.	100 00
	$204,556 24

	$204,556 24
Aug. 13th, dep.	87 50
" " dep.	468 13
" " dep.	16,752 19
	$221,863 56
	221,863 56
" 17th, dep.	5,000 00
	$226,863 56
127	226,863 56
Aug. 21st, dep.	83 54
	$226,947 10
	226,947 10
Aug. 23d, dep.	4,771 66
	$231,718 76
	231,718 76
" 27th, dep.	9,050 00
	$240,768 76
	240,768 76
" 30th, dep.	3 13
	$240,771 89
	240,771 89
" 31st, dep.	25,000 00
	$265,771 89

On the stubs of the check-book are entered checks for various amounts, commencing with check No. 14047, dated Aug. 1st, 1883, and ending with check No. 14233, which was the last check drawn on Aug. 31st, 1883.

The aggregate amount of such checks is $256,465.56.

1883.	
Oct. 31st	$121,866 60
Nov. 2d, dep.	20,000 00
	141,866 60
	141,866 60
" 3d, dep.	17,860 00
	$159,726 60

On the stubs of the check-book are entered checks for various amounts, commencing with check No. 14502, dated Nov. 1st, 1883, and ending with check No. 14729, which was the last check drawn on Nov. 3d, 1883.

The aggregate amount of such checks is $138,724.50.

128 Transcript from the check-book of the St. Louis and San Francisco Railway Company with the Marine National Bank from April 1, 1884, to the close of business, on the 6th of May, 1884.

The following are entered on the left-hand side of the check-book:

1884.

Ap'l	$109,703	
2, dep.	83,516	66
	$203,219	66
Ap'l	203,219	66
5, dep.	30,050	
	$233,269	66
Ap'l	233,269	66
10, dep.	18,930	
	$252,199	66
Ap'l	252,199	66
11, dep.	20,025	
	$272,224	66
12, "	30,060	
	$302,284	66
Ap'l	302,284	66
14, dep.	726	37
	$303,011	03
Ap'l.	303,011	03
21, dep.	50,004	19
	$353,015	22
129 Ap'l	353,015	22
25, dep.	30,000	
	$383,015	22
Ap'l	383,015	22
28, dep.	30,000	
	$413,015	22

1884.	
Ap'l	413,015 22
	130,854 50
	$282,160 72
1884.	
May	282,160 72
5, dep.	17,835
	$299,995 72

On the stubs of the check-book are entered checks for various amounts, commencing with check No. 16005, dated April 1, 1884, and ending with check No. 16396, which was the last check drawn on the 5th of May, 1884. The aggregate amount of such checks is $295,123.50.

Some of said checks were not presented to the Marine National Bank before its failure, and were not paid, and were on and subsequently to the 6th of May, 1884, returned to the plaintiff and redeemed by it. The amount of such checks is $1,996.00.

On the 6th of May, 1884, other checks, numbered from 16397 to 16408, inclusive, and amounting to $3,900.00, were drawn by the plaintiff on the defendant bank, which were not paid and were subsequently redeemed by the plaintiff.

130 E. F. Winslow, president; T. W. Lillie, sec'y and treas.; Geo. Butler, ass't treas.

ST. LOUIS & SAN FRANCISCO R'WAY CO., 15 BROAD ST.,
NEW YORK, *Nov.* 13, 1885.

To Hon. John E. Develin, N. Y.

DEAR SIR: The item, April 10, 1884, $18,930, about which I was to inform you, was a draft of C. W. Rogers, of Lowell, Mass.

Respectfully, T. W. LILLIE.

131 Circuit Court of the United States for the Southern District of New York.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY
against
WALTER S. JOHNSON. } No. —.

DISTRICT OF MASSACHUSETTS:

The depositions of Arthur F. Luke and William P. Shepard, witnesses on the part and behalf of the complainants in the cause above-entitled, now depending in said circuit court in and for the southern district of New York, taken before me, Winslow Warren, a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit, under an act of Congress in such case made and provided, at my office, 39 Court street, in said district of Massachusetts, on the 8th day

of June, 1885, and then, by adjournment, on the 15th day of June aforesaid, pursuant to a notice to that effect duly given by me and hereto annexed.

Henry C. Hutchins and James H. Young, Esqs., appeared on behalf of the complainants and Alfred D. Foster, Esq., appeared on behalf of the respondent.

The said witnesses, having been first by me duly sworn to tell the whole truth relative to the issue in the cause aforesaid, gave the following depositions:

UNITED STATES OF AMERICA, } ss:
District of Massachusetts, }

To Messrs. Devlin & Miller, 32 Nassau street, N. Y.

DEAR SIRS: Whereas the St. Louis and San Francisco Railroad Company has requested me to take the depositions of William P. Shepard, James Drown, and Arthur F. Luke, all of Boston,
132 Massachusetts, to be used in an action now pending between the said St. Louis and San Francisco R. R. Co. and Walter S. Johnston, in the circuit court of the United States in and for the southern district of New York, and the office of Winslow Warren, 39 Court street, in Boston, in said district of Massachusetts, and the 8th day of June, 1885, at 10 o'clock in the forenoon, are appointed the time and place for taking the said depositions. You are hereby notified that you may be present and put such interrogatories as you may deem proper.

Given under my hand and seal this second day of June, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] WINSLOW WARREN,
United States Commissioner.

STATE OF NEW YORK, } ss:
City and County of New York, }

Thomas D. Day, Jr., being duly sworn, says that he is twenty-one years of age and upwards; that on the 3d day of June, 1885, at No. 32 Nassau street, in the city of New York, he served the original notice, of which the annexed is a copy, on Messrs. Devlin & Miller, attorneys for the defendant herein, by delivering it and leaving the same with the person in charge of the office of said attorneys.

T. D. DAY, JR.

Sworn to before me this 4th day of June, 1885.

[SEAL.] OWEN FITZSIMONS,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

133 ARTHUR F. LUKE, being first duly sworn, in answer to interrogatories proposed by H. C. HUTCHINS, Esq., of counsel for complainant, testified as follows:

Int. 1. State your name, age, residence, and business.

Ans. Arthur F. Luke; thirty-two; Newton, Mass.; cashier of National Bank of North America, Boston.

Int. 2. How long have you been cashier of that bank?

A. Since June, 1881.

Int. 3. Please examine check shown you and state whether or not the same was presented to and paid by your bank. And, if so, when?

The copy of check is annexed to deposition of W. P. Shepard, marked B, W. W.

Objected to as immaterial.

Ans. It was presented to and paid by my bank May 7, 1884, through the clearing-house.

Int. 4. On whose account was it paid and to whom was it charged?

Objected to as before.

Ans. The account of the Atchison, Topeka and Santa Fé R. R. Company, and it was charged to their account.

Int. 5. Can you state at what time of day the check was paid?

Ans. At ten o'clock—that is, all checks paid through the clearing-house are considered as paid at ten o'clock; the demand on us is considered as made at ten o'clock, and we have until one o'clock to return them.

Cross-examination waived by the respondent.

(Signed) ARTHUR F. LUKE.

134 WILLIAM P. SHEPARD, being first duly sworn, in answer to interrogatories proposed by H. C. HUTCHINS, Esq., of counsel for complainant, testified as follows, viz:

Int. 1. State your name, age, residence, and occupation.

Ans. William P. Shepard; nineteen; Dorchester, Mass.; clerk at the Atchison, Topeka and Santa Fé railroad.

Int. 2. In what office of the railroad are you clerk?

Ans. In the assistant treasurer's.

Int. 3. What was your occupation in May, 1884?

Ans. Messenger in that office; attended to the banking business.

Int. *3*. Please examine the draft shown you and state, if you know, if and when the same was presented at the assistant treasurer's office of the Atchison railroad.

A copy of the draft referred to is hereto annexed, marked A, W. W.

Objected to as immaterial.

Ans. I have examined it. I cannot tell when it was presented. It was presented.

Int. 4. Can you tell what day it was presented?

Objected to as before.

Ans. May 6, 1884.

Int. 5. State what, if anything, you had to do in connection with the payment of that draft.

Objected to as before.

Ans. I presented it to the teller of the Atlantic Bank, with a check for the amount, $17,835.

Int. 6. At whose direction did you go to the Atlantic Bank with the check?

Objected to as before.

135 Ans. Mr. Goodwin's, the assistant treasurer.

Int. 7. What became of the draft?

Objected to as before.

Ans. It was endorsed by the cashier, stamped by the teller, and handed back to me.

Int. 8. Please examine check handed you and state whether or not that is the check with which you paid the draft.

A copy of check referred to is annexed, marked B, W. W.

Objected to as before.

Ans. It is.

Int. 9. State what time it was when you delivered the check to the Atlantic Bank.

Objected to as before.

Ans. Five minutes before one.

Objected to as before.

Ans. May 6, 1884.

X Int. 1. How do you know it was five minutes before one?

Ans. There was a clock just before the door of the bank which indicated the time; it being very seldom that I presented a check to the Atlantic, and seeing in the paper that the Marine Bank closed the next day, that brought the fact to my mind, thinking there might be something.

X Int. 2. You say in your answer to the fifth interrogatory that you presented the draft with a check to the teller of the Atlantic Bank. What did the teller do with the draft?

136 Ans. I told him to have the draft endorsed by the cashier, and then he stamped the draft, it being his custom to stamp them. The cashier endorsed it.

X Int. 3. Did you make any memorandum of the time at which you presented this draft?

Ans. No memorandum was made, but the point has been brought up so many times it is very vivid in my mind—just the time.

X Int. 4. How soon after the 6th of May was it first brought up to your mind?

Ans. The very next morning we had a discussion in the office about it—whether there would be any trouble about it.

X Int. 5. Did you pay any other drafts that day?

Ans. No other on the Atlantic Bank that I know of.

X Int. 6. Are you sure?

Ans. Quite sure.

X Int. 7. What other banks did you pay checks or drafts at that day?

Ans. I don't think of any.

X Int. 8. Did you see the cashier endorse "paid" on the back of that draft?

Ans. I saw the teller hand it to him, and I knew that to be his signature.

X Int. 9. What hour was this draft presented to the treasurer of the Atchison railroad?

Ans. I can't tell.

X Int. 10. What time did you leave the office that day to pay this draft?

Ans. The time it would take to go from the office to the bank. I went direct.

X Int. 11. Had you been to any other bank that morning?

Ans. That I couldn't say, this one case being brought up; I don't recall any other.

X Int. 12. Then, although you cannot tell whether you went to any other bank that day or whether you paid other checks or drafts for the Atchison railroad, you are ready to swear that it was exactly five minutes of one when you paid this draft at the Atlantic Bank?

Ans. I am.

(Signed) WM. P. SHEPARD.

137 A, W. W.

$17,835. NEW YORK, *May* 5, 1884.

Geo. L. Goodwin, Ass't Treas. Paid May 6, 1884. A., T. & S. F. R. R. Co.

Pay to the order of the Marine Nat'l Bank seventeen thousand eight hundred and thirty-five dollars, value received, and charge the same to the account of as advised.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
T. W. LILLIE, *Treas.*

To G. L. Goodwin, Esq., ass't treas. Atchison, Topeka & St. Fé. Railroad Co., Boston, Mass'tts.

(Written across the face.)

Audited, cash book, folio —. General auditor A., T. & S. F. R. R.

(Endorsed.)

Pay Atlantic National Bank of Boston, Mass., or order, for collection for account of Marine Nank of the City of New York.

N. D. DABOLL, *A. C.*

Paid: JAS. T. DROWN.

Atlantic National Bank, Boston, May 6, 1884.

138 B, W. W.

Atchison, Topeka & Santa Fé R. R. Co.

$17,835.00. BOSTON, *May* 6, 1884.

The National Bank of North America.

Pay to the order of Atlantic Nat. Bank seventeen thousand eight hundred and thirty-five $\frac{00}{100}$ dollars.

No. 239. G. A. GOODWIN.
Assistant Treasurer.

(Endorsed.)

Pay only through clearing-house to the Atlantic National Bank of Boston.

JAS. T. DROWN,
Cashier.

UNITED STATES OF AMERICA, *District of Massachusetts:*

I, Winslow Warren, a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit under an act of Congress authorizing the appointment of commissioners "for the more convenient taking of affidavits and bail to be used in civil causes depending in the courts of the United States," and the acts additional thereto, do hereby certify that Arthur F. Luke and William P. Shepard, the above-named deponents, appeared before me on the 8th, and, by adjournment, on the 15th day of June, A. D. 1885, at Boston, in said district of Massachusetts, and that having been by me first carefully examined and cautioned and sworn to testify the whole truth relative to the issue in the cause in the caption named, gave the foregoing depositions by them subscribed; that said depositions were reduced to writing by me in the presence of the witnesses, and carefully read to said deponents, and then subscribed by them as and for their
139 depositions in my presence; that said depositions were taken at the request of the complainant aforesaid; that said deponents were material and necessary witnesses in said cause, and live at Newton and Boston, respectively, in the district of Massachusetts, a greater distance than one hundred miles, and the place of taking said depositions is more than one hundred miles from the place of trial of the cause for which the depositions were taken. Exhibits A and B, W. W., were annexed by me.

I further certify that I am not of counsel nor attorney to either of the parties in the cause in and for which the said depositions were taken nor in any way interested in the event of said cause.

In testimony whereof I have hereto set my hand and seal this 26th day of June, A. D. one thousand eight hundred and eighty-five.

(Signed) [SEAL.] WINSLOW WARREN,
Commissioner of the Circuit Court of the United States for the District of Massachusetts.

(Endorsed.)

Opened and filed by order of court this 10th day of March, 1886.

140 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the thirtieth day of March, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable William J. Wallace, circuit judge.

(Eq. Cal. Feb. T., 1886.)

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY

vs.

WALTER S. JOHNSTON.

The above cause coming on this day for final hearing upon pleadings and proofs—

Mr. John E. Burrill is heard in behalf of complainant.

Mr. Charles E. Miller is heard in behalf of defendant.

C. A. V.

141 United States Circuit Court, Southern District of New York.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY

vs.

JOHNSTON, Receiver, &c.

WALLACE, *J.:*

The proofs show that for several years prior to the 5th day of May, 1884, the plaintiff kept an account with the Marine National Bank of the City of New York, making deposits with and drawing checks upon the bank from time to time. On the 5th day of May, 1884, the plaintiff deposited with the bank a sight draft for $17,835, dated that day and drawn by the plaintiff upon the treasurer of the Atchison, Topeka & Santa Fé Railroad Company of Boston, Mass., which company was indebted to the plaintiff in the amount of the draft. The bank was insolvent at the time, but forwarded the draft to its collecting agent at Boston, and the amount was paid to such agent by the drawee on the 7th day of May, after the bank had failed and closed its doors. On several occasions during the time the plaintiff kept an account with the bank the plaintiff deposited similar

142 paper at the same time with money, and the bank credited the plaintiff upon its books and also upon the pass-book of the plaintiff with the amount of such paper as a cash item. The plaintiff also entered the amount of such draft in a memorandum of deposits kept in its check-book among cash items. The plaintiff has never drawn against the credits given for sight drafts, but never had occasion to do so. There was no express arrangement or understanding between the plaintiff and the bank that such deposits should be treated as cash. When the draft in suit was deposited it was sent to the bank by a messenger boy, but the plaintiff's pass-

book was not sent, having previously been left with the bank for the purpose of being written up. The amount of the draft was credited by the bank on its own books to the plaintiff as a cash item, but it was not entered in the pass-book of the plaintiff until after the failure of the bank, and then without the plaintiff's knowledge. The defendant, who is the receiver of the bank, had notice of the plaintiff's rights before the proceeds of the draft were paid over to him by the collecting agent at Boston.

143 Inasmuch as the proceeds of the draft had not become commingled with the other moneys of the bank when the defendant took possession of its assets, but were capable of identification, the plaintiff is entitled, if they are its property, to follow them into the hands of the receiver and regain them. Illinois Trust and Savings Bank *vs.* Smith, Receiver, 21 Blatch., 275. The question, therefore, is whether the draft belonged to the plaintiff at the time it was paid by the drawee. If it did, the defendant did not acquire title to the money. If the transaction in controversy was equivalent to a discount of the draft the bank acquired title to the paper. If it was not the bank merely became the agent of the plaintiff to collect the proceeds.

The case of Metropolitan National Bank *vs.* Loyd, 90 N. Y., 531 (affirming the same case in the Supreme Court, reported in 25 Hun., 101) is an authority directly in point against the plaintiff's right to recover. In that case the plaintiff deposited with the bank a check drawn upon another bank in a different city, endorsed by him, and the amount of the check was entered by the bank upon the pass-book of the depositor as cash with the depositor's knowledge. It was held that the bank became the owner of the check. The

144 opinions delivered in this case, both in the court of appeals and in the supreme court, are a full and able discussion of the questions involved, and contain a full review of the authorities bearing upon them. On the other hand, the case of Balbach *vs.* Frelinghuyzen, decided by the circuit court of the district of New Jersey (15 Fed. Rep., 675), follows the views expressed in Morse on Banks and Banking, p. 427, and holds that the checks so deposited do not become the property of the bank, although, by the course of the business between the depositor and the bank, the depositor has been allowed to draw against the deposits before the paper has been actually collected.

Upon principle there is no reason why, if the parties choose to treat the deposit of such paper as a deposit of cash, the transaction should not be deemed equivalent to a discount of the paper by the bank. Sight bills drawn by one corporation upon another of prominent financial standing, like the interest coupon of such corporations, or like certified checks upon banks, are generally accepted in commercial usage as the equivalent of money. They bear

145 practically the same attributes as bills issued by banking corporations, which are merely promises to pay at sight, and are everywhere accepted as money in the absence of special circumstances affecting the financial standing of the corporation issuing them. When bank bills are credited at their face to their depositor

and are treated by the depository as a deposit of money, the bank receiving them becomes a debtor to the depositor for the face amount, although the currency may at the time be depreciated. Marine Bank *vs.* Fulton Bank, 2 Wall., 252.

When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency without discrimination as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper. If the customer assents to such action on the part of the bank by drawing checks against the credit, or in any other way, he manifests with equal clearness his intention to be treated as a depositor of money and, as such, as a creditor of the bank, instead of a bailor of the paper.
146 Under such circumstances it should be held that the bank acquires title to the paper just as it would to a deposit of money.

The intention of the parties in the particular transaction may be ascertained from the course of their previous dealings. When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred in the absence of new and inconsistent circumstances.

It is quite certain that bankers do not invariably credit their customers for sight papers as for cash, but are generally influenced by the financial responsibility of the customer or the drawee of the paper, or both. If a bank does not wish to assume the relation of a debtor for the paper to the depositor this intention may be manifested in a very explicit manner by crediting the paper as paper. This was done in Thompson *vs.* Giles, 2 Barn. & Cress., 422; in the case of Routen *v.* Rose, 15, and in the case of Sargeant *v. Id.*, 152. Some significance must be attached to a credit entry of the bill upon the books of the bank as cash, and the natural im-
147 plication would seem to be that the bank, by making such entry, assumes to receive the bill as money. Cor-elatively, if the depositor understands that the bank proposes to receive the paper as money and assents, expressly or by acquiescence, it would seem that he consents to part with the title to the paper.

For these reasons the conclusions reached in Metropolitan Nat'l Bank *vs.* Loyd are adopted as satisfactory. The authorities bearing upon the general questions are so fully cited and discussed in the opinions in that case that it is deemed unnecessary for present purposes to refer to them.

Although the plaintiff had never drawn against the credit for bills given by the bank, it appears that its balance was so large that there was never any necessity for it to do so. There is no room to doubt that its checks would have been honored if they had been drawn. The case is, therefore, to be considered as one where the course of business between the parties implied the understanding of both that sight bills should be treated in their account as cash.

It is insisted for the plaintiff that the bank did not acquire
148 title to the draft because it was insolvent, and this fact was known to its officers when the draft was delivered to it by the plaintiff. The case cannot be considered upon this theory, because there is no allegation in the bill that the officers of the bank entertained any fraudulent intention towards the plaintiff in receiving the paper, and the bill does not proceed upon such a theory. If the officers of the bank supposed the institution would be able to maintain its credit, and thus surmount its difficulties, they were under no legal duty to the plaintiff to disclose the state of its affairs. Silence with regard to a material fact which there is no legal duty to divulge will not vitiate a contract, although it eventually operates to the injury of the party from whom the fact is concealed. It is well settled that fraud cannot be imputed to a party who contracts an obligation, knowing himself to be insolvent, merely because he omits to disclose the fact to the other contracting party. Reddington *vs.* Roberts, 25 Vt., 686; Patten *vs.* Campbell, 70 Ill., 72; Smith *vs.* Murphy, 21 Penn. St., 367; Nichols *vs.* Pinner, 18 N. Y., 295; Atwood *vs.* Small, 6 Ct. & Fin., 232. If the bill were properly
149 framed to present the question of fraud the facts disclosed in the proofs might justify the conclusion that the affairs of the bank were so hopeless, and presumably known to be so to its officers, as to preclude the existence of an honest expectation on their part to repay the plaintiff's deposit, but the rule is inflexible that the decree must be *secundum allegata.*

A decree is directed dismissing the bill.

150 [Endorsed:] United States circuit court, southern dist. of N. Y. The St. Louis and San Francisco Railway Co. *vs.* Johnston, &c. Opinion. Wallace, J. U. S. circuit court. Filed April 22, 1886. Timothy Griffith, clerk.

151 At a stated equity term of the United States circuit court, held in and for the southern district of New York, at the United States court-house, in the post-office building, in the city of New York, on the 30th day of March, 1886.

Present: Hon. William J. Wallace, circuit judge.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY
against
WALTER S. JOHNSTON.

This cause having come on for final hearing upon the pleadings and proofs at the above time and place, and having been duly argued by counsel, after hearing John E. Burrill, Esq., of counsel for
152 complainant, and Charles E. Miller, Esq., of counsel for defendant, and due deliberation having been had thereon, and the court having duly rendered its decision that complainant's bill of complaint be dismissed with costs:

Now, on motion of Mess. Develin & Miller, solicitors for defendant, it is adjudged that the complainant's bill of complaint be, and the same

hereby is, dismissed with costs, taxed at two hundred forty-eight dollars and fourteen cents.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern dist. of New York. The St. Louis and San Francisco Railway Co. ag't Walter S. Johnston. Decree. Develin & Miller, sol's for def't, 32 Nassau St., N. Y.

To Messrs. Burrill, Zabriskie & Burrill, solicitors for complainant:

153 Please take notice that the within proposed decree will be presented for settlement to Hon. William J. Wallace, circuit judge, at his chambers, in the U. S. post-office building, in the city of New York, on the 24th day of April inst. at 11 a. m.

Y'rs, &c. DEVELIN & MILLER,
Sol's for Def't.

Dated N. Y., April 22, 1886.

Service of a copy of within proposed decree and notice of settlement is hereby admitted this 22d day of April, 1886.

BURRILL, ZABRISKIE & BURRILL,
Sol's for Complainant.

[Endorsed:] U. S. circuit court. Filed Ap'l 26, 1886. Timothy Griffith, clerk.

154 At a stated term of the circuit court of the United States held in and for the southern district of New York, in the second circuit, at the United States court-rooms, in the city of New York, on the 26th day of April, 1886.

Present: Hon. William J. Wallace, circuit judge.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY
against
WALTER S. JOHNSTON.

Appeal allowed in open court in the above-entitled action.

WM. J. WALLACE.

155 Please take notice that the within is a copy of allowance of appeal duly entered and filed in the office of the clerk of the United States circuit court for the S. D. of N. Y. in the within-entitled action, on the 26th day of April, 1886.

Yours, &c., BURRILL, ZABRISKIE & BURRILL,
Attorneys for Complainant & Appellant,
21 *Broad Street, New York.*

Dated New York city, Ap'l 29th, 1886.

To Develin & Miller, Esqs., attorneys for defendant & appellee.

Due and timely service of a copy of the within and of the foregoing notice is admitted.

Dated New York, April 29th, 1886.

DEVELIN & MILLER,
Att'ys for Def't, &c.

(Endorsed:) U. S. circuit court, S. D. of N. Y. The St. Louis
156 and San Francisco Railway Company ag'st Walter S. Johnston. Allowance of appeal, Burrill, Zabriskie & Burrill, attorneys for complainant & app'l'ts, 21 Broad street, New York. U. S. circuit court. Filed Ap'l 26, 1886. Timothy Griffith, clerk.

157 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY
ag'st
WALTER S. JOHNSTON.

Know all men by these presents that we, Henry E. Kavanagh, of No. 10 West 44th street, in the city of New York, and C. C. Howard, of No. 108 Henry street, in the city of Brooklyn, Kings county, are held and firmly bound unto the above-named defendant in the sum of one thousand dollars, to be paid to said defendant; for the payment of which, well and truly to be made, we bind ourselves,
158 our heirs, executors, and administrators, firmly by these presents.

Dated and sealed the 24th day of April, 1886.

Whereas the above-named plaintiff has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled suit to the circuit court for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named St. Louis and San Francisco Railway Company shall prosecute its appeal to effect and answer all damages and costs if it shall fail to make its appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

159 C. C. HOWARD. [L. S.]
HENRY E. KAVANAGH. [L. S.]

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Henry E. Kavanagh, being sworn, says that he is a resident and a freeholder within the State of New York and worth twice the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

HENRY E. KAVANAGH.

Sworn to before me this 24th day of April, 1886.
[L. S.] DAN'L RUMBOLD,
Notary Public, N. Y. Co. (41).

SOUTHERN DISTRICT OF NEW YORK, } ss:
City & County of New York, }

C. C. Howard, being sworn, says that he is a resident and
160 a freeholder within the State of New York and worth twice the sum specified in the above undertaking over all the debts

and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

C. C. HOWARD.

Sworn to before me this 24th day of April, 1886.

[L. S.] DAN'L RUMBOLD.
Notary Public, N. Y. Co. (41).

STATE OF NEW YORK, SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

On this 24th day of April, 1886, before me personally appeared the above-named Henry E. Kavanagh and C. C. Howard, to
161 me personally known and known to me to be the individuals described in and who executed the above undertaking, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

[L. S.] DAN'L RUMBOLD,
Notary Public, N. Y. Co. (41).

Circuit Court of the United States for the Southern District of New York.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY
ag'st
WALTER S. JOHNSTON.

The foregoing bond approved and appeal allowed.
April 26th, 1886.

WM. J. WALLACE.

Endorsed: St. Louis & San Francisco R'y Co. *vs.* Walter S.
162 Johnston. Bond on appeal. U. S. circuit court. Filed Ap'l 26, 1886, Timothy Griffith, clerk.

163 United States of America to Walter S. Johnston, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be held at Washington on the second Monday of October, 1886, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The St. Louis and San Francisco Railway Company is appellant and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

Dated April 26th, 1886.

WM. J. WALLACE.

164 Please take notice that the within is a copy of citation duly entered and filed in the office of the clerk of the United States

circuit court for the S. D. of N. Y. in the within-entitled action April 26, 1886.

Yours, &c., BURRILL, ZABRISKIE & BURRILL,
Attorneys for Complainant & Appellant,
21 *Broad Street, New York.*

Dated New York city, Apr'l 29th, 1886.

To Develin & Miller, attorn'ys for defendant & appellee.

Due and timely service of a copy of the within and of the foregoing notice is admitted.
Dated New York, April 29th, 1886.

DEVELIN & MILLER,
Att'ys for Def't.

165 Endorsed: U. S. circuit court, S. D. of N. Y. The St. Louis and San Francisco Railway Company ag't Walter S. Johnston. Citation. Burrill, Zabriskie & Burrill, attorneys for compl't, app'l't, 21 Broad street, New York. U. S. circuit court. Filed April 30th, 1886. Timothy Griffith, clerk.

166 THE UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and sixty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The St. Louis and San Francisco Railway Company, complainant & appellant, against Walter S. Johnston, defendant & appellee, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 15th day of June, in year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the said United States the one hundred and tenth.

[Seal United States Circuit Court, Southern District of New York.]

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 300. The St. Louis and San Francisco Railway Company, appellant, *vs.* Walter S. Johnston. Filed July 12, 1886.

United States Supreme Court.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,

Appellant,

against

WALTER S. JOHNSTON, Receiver of the Marine National Bank of the City of New York,

Respondent.

BRIEF FOR APPELLANT.

JOHN E. BURRILL,
Of Counsel for Appellant.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

UNITED STATES SUPREME COURT.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
Appellant,

AGAINST

WALTER S. JOHNSTON, Receiver of the Marine National Bank of the City of New York,
Respondent.

Brief on behalf of Appellant.

Statement of Facts.

This is an appeal from a decree of the Circuit Court for the Southern District of New York dismissing the appellant's bill.

The opinion of the Court is in the Record, page 92.

The bill was filed to recover the proceeds of a draft deposited by the appellant with the Marine Bank of the City of New York, of which the respondent is the Receiver.

I. It was claimed by the bill (pages 1 to 3) that the appellant was entitled to the proceeds of the draft, *first*, because the draft was deposited for collection, and *second*, because the bank was insolvent at the time it received the draft from the plaintiff, and such fact was known to the officers of the bank, and by holding

itself out as solvent and concealing its insolvency the bank had been guilty of a fraud on the appellant.

II. On May 5, 1884, the Atchison, Topeka and Santa Fé Railroad Company, being indebted to the appellant in the sum of $17,835, the latter drew a draft on that company for that amount, dated on that day, payable to the order of the Marine Bank (see copy Record, page 8), and sent the same to that bank, which was a banking corporation organized under the National Banking Act, and with which bank the appellant had for several years previously had and then had an account.

III. The Marine Bank was in fact insolvent when it received the draft and in fact, as stated in opinion (p. 92), had been so for some time previously (Johnston, pp. 73–75), Camp (p. 67), Baldwin (p. 70), Carr (p. 39). It opened its doors for business at 10 o'clock on the morning of the 6th of May, 1884, and closed them at 20 minutes before 11 o'clock of that day (Test. Carr, Record, p. 39), and never resumed business. The respondent was appointed Receiver of said bank on the 13th of May, 1884 (p. 72).

IV. The Marine Bank sent the draft to its correspondent, the Atlantic National Bank of Boston, for collection and credit and was by that bank presented to the drawee on May 6th, 1884 (Shepard Test., p. 88), and the drawee at five minutes before one o'clock, P. M., of that day (May 6), sent its check on the National Bank of North America to the Atlantic Bank (p. 91). Said check was presented for payment and paid to the Atlantic Bank on May 7, 1884, and on such payment the draft was surrendered to the drawee (Shepard Test., p. 90).

V. A correspondence between the parties then ensued in regard to the draft and its proceeds (Ex. A and

Ex. B, p. 81; Lillie Test., p. 9), and by direction of appellant, on May 19, 1884 (p. 10), the proceeds of the draft in the hands of the Atlantic Bank were arrested, but subsequently the arrest was released and the fund paid to the Receiver under a stipulation and agreement read in evidence and marked Exhibit No. 1 (see same, pp. 81, 82), whereby the right was reserved to the appellant to make claim to the proceeds, and in pursuance of such agreement this action was commenced (Opinion, p. 93).

VI. It was alleged in the bill (p. 1), and admitted by the answer (p. 4), that the Marine Bank never paid or advanced anything to the complainant on the draft so deposited, and that the complainant was not at the time of the deposit or at any time since indebted to the Marine Bank, but that at the time of the deposit the bank was largely indebted to the complainant.

VII. It was proved by testimony of Butler, assistant treasurer of the appellant (p. 13), that the balance to its credit in the Marine Bank at 9 o'clock A. M. of May 6, 1884, not including the draft, was $117,981.72, and also that checks to the amount of $3,894 were drawn by the appellant on the Marine Bank on May 6th, before notice of its failure, and redeemed by appellant, who also redeemed other checks drawn previous to May 6th, and not paid by the Marine Bank, to the amount of $1,996.

VIII. It was proved that the draft in question was sent to the Marine Bank under the following circumstances: George Butler, the assistant treasurer drew the draft and handed it to Mr. Lillie, the treasurer of appellant, who signed it and handed it back (without any instructions) to Butler. Butler gave the draft to the messenger and told him to take it to the Marine Bank, but gave him no other instructions. The mes-

senger took the draft with a deposit ticket (Ex. B., p. 82) and handed it to Rossell, an assistant of Carr, the receiving teller of the bank, who was absent at the time. The ticket is as follows :

" Deposited by St. Louis & San Francisco Railway
" Co. in the Marine National Bank, May 5, 1884,
" *Checks* ..... $17,835 "

All of the ticket is printed except the word and figures " May 5," and the figure " 4," and the figures " $17,835."

IX. The messenger who took the draft did not have the pass-book, and no entry of the draft was made in it until after the Receiver took possession (Lillie's Test., p. 79 ; Opinion, pp. 92–3). At the time of the deposit in question the pass-book was not in the hands of Carr or of Rossell (Rossell Test., p. 46 ; Carr Test., p. 37), but was in the hands of some of the bookkeepers of the bank, where it had been since April 30, 1884, and it remained in the possession of the bank or of the Receiver until May 19, 1884, when it was obtained from the Receiver (Record, p. 9).

FORCE, a bookkeeper in the bank, testified that all the entries in the pass-book between one of April 28, 1884, on credit side of $30,000, and an entry of June 13, 1884, were made by him when he balanced the pass-book, and that if the pass-book had been in the possession of the teller when the draft was received the entry would have been made by him, but that he (Force), being a bookkeeper only, made entries in the pass-book only when it was balanced or when deposits had been omitted (Record, pp. 53–55), and such entry was made by him from a book kept by the bank called an individual deposit ledger (p. 53), and that the entry of the draft in question was made by him in the pass-book when he balanced it (pp. 55, 56). The

exact time when he balanced it does not appear, but it must have been after May 7, 1884, and before May 17, when the Receiver was appointed and took possession. The book was returned to the appellant on May 19 (Record, p. 9). The entry in the pass-book of the draft, no matter when made, was not made with the knowledge or by the assent or direction of the appellant (Opinion, pp. 92–3).

X. FORCE also testified (p. 51) against the objection of appellant, that he made the entry of the draft in suit in the individual deposit ledger from the deposit ticket Exhibit B, which he got from the desk of the receiving teller (Force, Test. p. 51) but on cross-examination stated that he so testified not from recollection but because that was the usual course of business, and he does not state when the entry was made.

XI. Testimony was given by respondent under objection in regard to entries of the deposit in question in the books of the Marine Bank (Record, p. 21).

WILLIAM J. BROOKS, the assistant receiving teller of the bank, testified that on May 5, 1884, he entered the draft in suit as cash to the credit of appellant in the credit book of dealers, and made the entry from the deposit slip handed him by the receiving teller (pp. 23, 24).

ROSSELL, the assistant receiving teller of the bank, testified that when he received the deposit in question he applied to the assistant cashier for instructions, and was by him directed to receive it as cash (Record, p. 24). It is not claimed that this was done with the knowledge or by the request of appellant.

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XII. It was proved by Lillie, the treasurer, and Butler, the assistant treasurer, that appellant was not authorized to draw against the draft in question before its actual collection, and that there was no arrangement

or understanding verbal or written, or any course of dealing between the parties in regard to allowing the appellant to draw against the draft in question before its collection, nor in regard to allowing it to draw against any out of town paper before actual collection; and that they never knew of any such arrangement, and that no drafts were drawn against any out of town paper before its actual collection; and that there were no dealings of the bank from which such an arrangement could be implied; and that as appellant was always a large creditor of the bank, it had no occasion to draw, and the question of its right to draw never arose (Lillie Test., pp. 11, 12, 14, 15, 16; Butler Test., pp. 13, 17, 18; Opinion, p. 92).

XIII. The only occasions on which deposits of out of town paper had been previously made by the appellant with the bank were four, to wit:

August 23, 1883, $4,750 (see Deposit Ticket, Ex. H, Record, p. 83).

August 27, 1883, $9,050 (see Deposit Ticket, Ex. E, Record, p. 82).

November 3, 1883, $17,835 (see Deposit Ticket, Ex. C, Record, p. 82).

April 10, 1884, $18,930 (see Deposit Ticket, Ex. D, Record, p. 82).

May 5, 1884, is the deposit in question (see Deposit Ticket, Ex. B, Record, p. 11).

Taking these several deposits in their chronological order the evidence in regard thereto is as follows:

XIV. As to deposit of August 23, 1883 (Exhibit H) no evidence was offered by the defendant in regard to it. Rossell, the only witness examined, testified that he did not receive it and knew nothing about it (Record, page 45), and further that he had nothing to do with the entries in the credit book (Record, page 47).

XV. As to deposit of August 27, 1883 (Ex. E), Rossell says (Record, p. 45) that he cannot say that he received it, that he entered it in the pass-book and may have so entered it after it had been received by another person (Record, p. 45), but there is no positive evidence as to who received the deposit or as to the circumstances under which it was made, or that it was made before the draft was collected; and page 48, he says that he cannot give the items.

XVI. As to deposit of November 3d, 1883 (Ex. C, Carr Record, p. 29). Carr states that one of the items was a foreign item and that the letters "F" were marked by him opposite the entry on the ticket, but that he was not in the habit of marking such items under $1,000, and that he did not make the entry in the pass-book. It does not appear that the $25 was cash. Carr also testifies (Record, p. 36) that before entering that deposit as cash he applied to the president for instructions in regard to it and was told by him to take it as cash, but there is no evidence that appellant had any knowledge of this—and further Carr testified that he did not make the entry in the pass-book, but (Record, p. 37) that it was made by a bookkeeper named Culver, who was not called, which shows that the pass book was not presented with the draft. Carr also testified that all foreign paper of large amount when received was marked F, and the reasons given by him (pp. 30, 31) show conclusively that it was for the purpose of enabling the bank to trace such items and to *charge them back* when it was thought proper to do so, as stated by the witness Carr (p. 34–38) and by Barrow in his evidence (Record, p. 62–63). Force (Record, p. 48) says that the entry of the deposit in the Individual Deposit ledger is made by Culver, who also made the entry in the pass-book (see Record, p. 37), and it is

proved that bookkeepers made entries in the pass-book and ledger only when they made up the account and that bookkeepers did not receive deposits (Record, p. 55). This also shows that the pass book was not presented with the draft.

XVII. As to the deposit of April 10, 1884, Exhibit D Rossell (Record, p. 43), at first said that the entry is made by him in the pass-book, and was made at the time, but afterwards states (p. 44) that he has no recollection of the transaction "but simply takes it from the evidence of the ticket," and on p. 46 says that he has no recollection in regard to the transaction. Force (Record, p. 50) testifies that the entry of this deposit on the deposit ledger was made by a bookkeeper named Munn.

XVIII. As to the deposit in suit of May 5, 1884, Exhibit (B), Rossell says (Record, pp. 46 and 47), that he had no authority to receive this draft as cash and applied to Daboll, the assistant cashier, who instructed him to receive it as cash and he placed the ticket on a spindle and the credit clerk credited it in the credit book and that the entry was not made in the pass-book at the time. Force, the bookkeeper, says (Record, p. 51), that he entered it in the pass-book, and that there is nothing to indicate that he ever saw the deposit ticket page 51, and the evidence shows that the bookkeeper made the entries in deposit book from the credit ledger and not from the tickets, and Force says (page 53), that the entry of the deposit in the pass-book was made from the credit ledger.

Barrow, who had charge of the foreign paper (Record, pp. 62, 63), says that he had nothing to do with receiving it from the depositor—but that it was a part of his duty to see that the appellant should not deposit too many foreign checks as cash, and that he was instructed to watch the account in that respect.

First Point.

The following facts are established by the evidence and the application thereto of established legal principles.

1. The draft in controversy was sent by the plaintiff to the defendant by a messenger without any instruction other than it was to be taken to the bank (Statement of Facts, Art. VIII.).

2. No entry of the draft was made on the appellant's pass-book at the time of the deposit, or until after the failure of the bank and the collection of the draft (Statement of Facts, Art. IX.).

3. The draft and ticket was received by Rossell, one of the assistants of Carr, the receiving teller (who was absent), and he, before receiving it, applied to Daboll, the assistant cashier, for instructions as to how he should receive it, and was instructed to receive it as cash (Statement of Facts, XVI.), and in order to do so he placed the deposit ticket on a spindle, from which it was taken by the assistant, and therefrom the draft was entered in the credit ledger by Force, one of the bookkeepers, and from that was entered by him in the plaintiff's pass-book after the failure of the bank, and after the draft had been collected in Boston (Art. IX., Statement of Facts).

4. It does not appear when these entries were made in the credit ledger, or in the individual deposit ledger, or that they were so entered before the actual collection of the draft in Boston by the Atlantic Bank.

5. If the draft in suit was, in fact, entered as cash on the books of the bank to the credit of appellant, the

latter, made no request that it should be so treated, and had no notice or knowledge that it had been so entered in the books of the bank.

6. There was no arrangement or understanding between the bank and the appellant whereby the latter was authorized or entitled to draw against this draft or other out-of-town paper before the actual collection (Statement of Facts, Art. XII.; Opinion, p. 92).

7. Appellant never had, in fact, drawn on the bank against out-of-town paper before its actual collection and payment, and had never had occasion to draw against such paper before actual collection or payment (Statement of Facts, Art. XII.; Opinion, p. 92).

8. There had at no time been any dealings or transactions between the bank and the appellant which would have justified the latter in drawing or in believing that he would be justified in drawing on such paper before collection and payment (Statement of Facts, Art. XII.).

9. Appellant always kept a balance to its credit on deposit with defendant without regard to the collection of any paper deposited (Statement of Facts, Art. XII).

10. The draft in question was, in fact, paid by the drawee to the Atlantic Bank in Boston after the failure and closing of the Marine Bank (Statement of Facts, Art. IV.).

11. The Marine Bank was insolvent on the 3d day of May, 1884 (Record, p. 74; Opinion, p. 92), and its condition at that time was and long previously had been such that it must have been known to the officers and directors of the bank, and would have become known to them had any examination of the affairs been made (Statement of Facts, Art. III.).

Second Point.

The legal principles applicable to the case are established by the following decisions:

1. *In Scott vs. Ocean Bank in the City of New York*, 23 *N. Y.*, 289, it was held that property in paper received by a banker to be credited to the dealer vests in the banker *only* when he has become absolutely responsible for the amount to the depositor. Such an obligation previous to the collection of the bill can only be established by a contract to be expressly proved or inferred from an *unequivocal course of dealing.* * * * The fact that the customer constantly drew against remittances under the circumstances in the case was not sufficient to charge the banker with responsibility for a bill previous to payment; and, consequently, to vest him with the property in such bill.

In their opinion the Court say (p. 292): "No reasons are disclosed from which it can be reasonably inferred that the bank would consent or had any inducements to consent to treat as cash and make itself debtor for every bill that might be remitted to it, without reference to the standing and responsibility of the parties which in many cases might be unknown. * * * It is more reasonable to assume that the bank would at least reserve the right to elect whether to give credit absolutely or not before the proceeds were realized; and until such election was made and credit was in fact given therefor the bill would be held by it as the property of the depositor." This case was approved by the same Court in Dickerson vs. Wason, 47 N. Y., 439, where it is said "that the agreement must be express or implied from unequivocal cause of dealing," and the Court alluded to the fact that the draft was never credited in fact, and that if not paid the depositor was liable on it.

II. *In Metropolitan National Bank of New York vs. Loyd, 25 Hun, 101* (which was affirmed by the Court of Appeals in *90 N. Y., 531*), and which is relied upon by the Court below in its opinion as sustaining its decree, the facts are essentially different from those in the case in hand. The Court there held that where a check due at the time is deposited in a bank in a general account, and is with the payee's knowledge and without dissent on his part, and in accordance with an arrangement made by him with the bank, credited in his bank-book as so much cash, the title to the check vests in the bank. In their opinion the Court say:

"From the circumstance that the check was entered in the (deposit) ticket as 'check,' it might be inferred that it was received only for collection. But the fact is that the check was sent with another check for $9, and that both were entered as cash in his bank-book at the time and after the entry was made the book was passed back to the depositor who observed what had been done for the purpose of understanding the entry, and, on finding it to be correct, left the bank." The Court also say "that the intention that the check should be received as cash is to be inferred from the fact that the check was due immediately and was drawn on a bank, and for all purposes of the parties was the equivalent of so much money, * * * and such intention is confirmed by preceding transactions admitted by the depositor in which checks were deposited and entered as cash in his bank-book, and that the custom of the bank in its dealings with him was to credit him with all checks as money."

The Court cited *Giles vs. Perkins, 9 East., 12*, as an authority that where the bills deposited were not due the inference was they were not received as cash but only for collection, and *Thompson vs. Giles, 2 Barn. & Cres.*, 422, as an authority that where the bills were entered as *bills*, the fact that the amount was carried into

the cash column did not show that the customer assented to their being considered as cash, and other cases, and thereupon the Court say "in all these cases the instruments were delivered to the bank expressly for collection, or the intention so to do was plainly to be inferred from the fact that they were not at the time due or were entered in terms as bills."

In the same case on appeal (*90 N. Y., 534*) on which the appellate Court had no right to review the findings of the Court below, but only to review questions of law. The Court say: "Although no express agreement was made transferring the check, it was delivered (by the depositor) to the bank and accepted by it, and the bank gave credit for the amount to the depositor and he accepted it."

In *Clark vs. The Merchants' Bank*, *2 N. Y., 383*, the Court held that the title of the draft passed because it had been passed to the credit of Clark & Co. (the depositor) as cash by their instructions, and because Clark & Co. had drawn against the draft by previous arrangement.

In *Balbach vs. Frelinghuysen*, *15 Fed. Rep., 683*, the plaintiff claimed that a check not due had been deposited for collection. The defendant claimed that the check was, at the time, credited as cash to the depositor in his pass-book, and that by the course of dealing, plaintiff was at once entitled to draw against it the same as cash.

The Court (p. 682), after stating that its impression had been different, says "that giving credit on its books to a depositor for the amount of a check or negotiable paper deposited does not transfer the title to the paper deposited unless it was deposited to make good an overdraft or the amount is immediately drawn against, in which case the bank may hold the deposit until the overdraft is made good." The Court also held that the practices of banks to credit deposits of checks at once to the account of the depositor and to allow him to draw against them

before the collection has been made is a gratuitous privilege not based on consideration and has not become a binding legal usage. The Court also say: "That the credit of the check upon the bank-books and on the pass-book is not conclusive evidence of a special contract that the check should at once become the property of the bank for value because (1) Where credits are thus made banks claim and exercise the right of charging back the checks when unpaid to the depositor, which could not be done if the check had become the property of the bank and did not remain the property of the depositor until collected; (2) Such practices to credit such deposits and to allow drafts against before collection is reckoned by the ablest text writers to be a mere gratuitous privilege which has not become a binding legal usage," citing *Morse on Banks and Banking*, in his chapter on Collections, page 427.

The Court add, "From the above facts and from the further fact that the account between the two parties had not changed between the date of the deposit and the failure of the bank and that no draft had been drawn by the depositor, the title to the check did not pass to the bank."

In Bank vs. McDonald, 51 Cal., 66, it was held that where checks on another bank are deposited with a bank by its customer and credited in the pass-book, in the absence of other evidence of agreement between the parties, the conclusion is that they are received for collection and not as cash.

In *Bank vs. Miller, 77 Ala., 173*, it was held "In the absence of a special agreement a check when deposited is taken generally for collection and the bank does not owe the amount until it is collected. * * * When the dealer has been accustomed to deposit such checks and to have the entries thereof made in the pass-book and to draw against such deposits, such fact in the absence of any different understanding is something more."

In *Louisiana vs. Bank, 1 McGloin's Rep., 185*, the Court say: "Checks, drafts, bills or notes deposited with a bank even where the amount is entered on the pass-book are placed there for collection and are not sold. It is hard to imagine any advantage which could exist calculated to induce a bank to assume ownership and responsibility for such paper. The fact that owing to the short course such paper has to run these banks usually permit their customers to draw against the amount of checks deposited does not of itself alter the relation of the parties. The credit is only conditional, and may be canceled and the check returned should the latter be dishonored, and the depositor remains the owner of the paper and the bank merely the agent for collection." Citing authorities.

In *Ex parte Barkworth, 2 De Gex & Jones, 195*, where "the bills were not due (although not entered short) and were distinguished in the account as '*bills*' and the full amount credited in the cash column as of the date when received, and the customer was at liberty to draw to the extent of the balance, and interest was allowed by the bank from the time when the amount was received, it was *held* in the absence of the customer's acquiescing in or authorizing the bank to treat the bills as its own from the time when received that they remained the property of the customer subject to any lien of the bank for any balance due by the dealer, and that the bank had no right to transfer the draft unless the cash balance was in its favor." In that case the bills were entered with cash items and the gross amount carried into the cash column.

In *Giles vs. Perkins, 9 East., 12*, Lord ELLENBOROUGH, C. J., says: "Every man who pays bills not then due into the hands of his banker places them there as in the hands of his agent to obtain payment of them when due. If the banker discount the bill, or advances money upon the credit of it, that alters the

case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance.

In *Thompson vs. Giles, 2 Barn. and Cress., 428*, BAYLEY, J., says: "It is claimed that we must infer an agreement between the banker and his customer that as soon as the bills reached the hands of the former the property should be changed. Undoubtedly this would be so if there were any such bargain, but if there be none then the relation resembles that of principal and agent and the bills continue the property of the customer." Such is the general rule and that being so he asks how it would benefit the customer to have his bills considered the property of the banker, and says that in the absence of any valuable consideration it seems to him to be unreasonable for a banker to make such claim and imprudent in a customer to accede to it and that he should not be disposed lightly to infer such a contract.

HOLROYD, J., says: It is clear as a general rule that the property in paper deposited by a customer, although he may have the right to expect that his drafts will be honored to the amount of the deposit, is not altered; they still remain the property of the customer, subject to the lien of the banker for any balance due him. Some special circumstances must be shown to change the property and vest it in the banker or his assigns. * * * In *Giles vs. Perkins*, 2 Barn. and Cress., 422, it was held that an entry of bills as cash was not of itself sufficient to convert the property. In order to change the property it must be shown that the bankers bought the bills or discounted them, which is indeed the same thing; then the customer might have immediately sued the bankers for the price which they agreed to give for the bills but still retained in their hands. * * * In this case they were entered as bills, not as cash, and even if the latter mode of entry had been adopted it would still, according to *Giles vs. Perkins, supra*, have needed explanation. In the pass-book the bills were

entered at the full amount; that would not show that they were discounted. In the interest account interest upon the amount is charged upon each bill until it was actually paid; but when a bill is discounted the interest to be deducted is calculated up to the time when it becomes due and for no longer period."

See also *In re* Sargent, 1 Rose, 152.
In re Buchanan, *Ib.*, 280.

In *Story on Agency*, § *228, note 3*, it is stated: "Lord "Eldon seems to have been of the opinion that if the "bills were entered as cash with the knowledge of the "customer and he drew or was entitled to draw upon "the bank as having that credit in cash, he would "thereby be precluded from recurring to the bills spe-"cifically."

2 Morse on Banking, page 896, §§ 565, 573, 583–588.

where the authorities are collated, and the result stated.

Third Point.

There is no evidence to prove that there was any express agreement made at the time of the deposit whereby the draft was received and credited by the Bank to the appellant as cash, or whereby the title to the draft was to be transferred to the bank so as to become its property, and no such agreement can fairly be implied from the circumstances attending the deposit.

1. Appellant did not request the bank to credit the draft as cash or give any instructions to the messenger to make such request.

2. Nothing was taken to the bank but the draft and the deposit ticket, and the draft was described in the ticket as a *check* and not as cash (25 Hun, 101, *ante*).

3. No other deposit was made at the time, and in this respect the case differs from the case of Metropolitan Bank vs. Loyd in 90 N. Y., p. 531, and 25 Hun, 101, cited in the opinion of the Court below, where a check and cash were deposited together, and the aggregate amount was entered in one item as cash in the pass-book at the time, and this too with the knowledge and assent of the depositor.

4. The draft was described in the ticket as check and was not due.

   Metropolitan Bank vs. Loyd, 25 Hun, 101.
   Ex parte Barkworth, 2 De Gex & J., 195.
   Thompson vs. Giles, 2 B. & C., 428.

5. The messenger who took the ticket and the draft had no authority to bind the appellant or to make any agreement on its behalf, and his duty was discharged when he handed the draft and ticket to the teller.

6. The fact that the messenger did not have the pass-book, and that it was not in the possession of the teller, and that no entry of the draft was made in it at the time, distinguishes this case from all others to which our attention has been called, and shows the absence of any contemporaneous agreement.

7. The fact that no entry was made in the pass-book until after the failure of the bank and after the collection of the draft, and that appellant had no notice or knowledge of any such entry in the pass-book until the book was returned to it on May 19,

after the claim of the bank to the proceeds had been presented to the Receiver by letter of May 17, 1884 (Exs. A and B, p. 81) repels any claim of assent on the part of appellant to the claim of the bank.

8. Even had the entry been made in the pass-book, at the time of the deposit, this is not sufficient in the absence of other evidence.

Bank vs. McDonald, 51 Cal., 66.
Bank vs. Miller, 77 Ala., 173.
Louisiana vs. Bank, 1 McGloin, 185.
Ex parte Barkworth, 2 De Gex & Jones, 195.
Giles vs. Perkins, 9 East., 12.

9. The appellant was a large creditor of the bank, and at the time had and always had large sums on deposit with it, and had never before drawn against out-of-town paper, or had any occasion so to do, and had no occasion to draw against these drafts, and there is nothing to show that it had any intention or desire to do so, or that it desired that the draft should be credited as cash, or that there was anything to induce appellant to desire that it should be so credited.

Balback vs. Frelinghuysen, 15 Fed. R., 683.

10. The fact that the appellant was not at the time a debtor to the bank and had not drawn against the draft is regarded in many of the cases as a controlling fact and as conclusive against the claim of the bank.

Balback vs. Frelinghuysen, 15 Fed. Rep., 683.
Giles vs. Perkins, 8 East., 12.
Thompson vs. Giles, 2 B. & C., 428.
Story Agency, § 228, note 3.

11. The application made by Rossell, the assistant re-

ceiving teller, who received the draft, to the cashier for instructions as to how the draft should be received, was not made at the request or with the knowledge of appellant, but the fact that such application was made tends to show that there was no rule or practice or established course of dealing in this respect and that it would not have been entered even on the books of the bank as cash without special authority from the officers of the bank.

12. The bank had no inducement to credit the draft as cash before collection, and thereby subject itself to an allowance of interest to the appellant, and the fact that the whole amount of the draft was credited after the failure shows that it was not discounted.

Op. Holroyd, 2 B. & C., 422.

13. The case differs from those ordinarily presented in this, that the draft deposited was drawn by the appellant on its debtor—was not drawn on a bank—was not the deposit of paper made by third parties and owned by the depositor, and further, that the appellant was liable as drawer of the draft, and as it had no need of the money, it had no inducement that the draft should be taken as cash.

14. The fact that the bank was careful to identify the draft on its books, reserving the right to charge it back and to refuse to allow it to be drawn against brings the case within the principles of 15 Fed. R., 683.

15. The transaction so far as the appellant was concerned was complete when the draft and ticket were left with the defendant on May 5, 1884, and the rights of the parties must be determined by the

facts then existing, because there was no communication between the appellant and the bank or those who represented it until May 17, 1884.

16. The appellant is not bound by anything which the bank did in respect to the draft after it was delivered to the teller without the knowledge or assent of the appellant.

17. Nor is the appellant bound by any entries so made on the books of the bank, nor even in the pass-book, nor are such entries in the absence of proof of knowledge or assent on the part of the appellant evidence of any agreement, intention or desire on the part of the appellant that the draft should be treated as cash, nor are such entries conclusive against the appellant, nor evidence against the appellant for any purpose.

Bank vs. Smith, 19 Johns. Rep., 115.

18. It may be that had a request or application of the appellant that the draft be received and credited as cash, been proved, the fact that it was so entered at the time would be competent to show the assent of the bank to such application, but the making of such entries would not furnish any evidence that any such application or request had been made.

19. But we submit that to make such entries competent for any purpose it must be shown that they were made at the time and before the collection and payment of the draft and under such circumstances as would enable the depositor to use such entries against the bank, and that entries "*post litem motam*," and without notice to the depositor, are not available in favor of the bank.

20. But the evidence shows that in the present in-

stance, and in all instances where out-of-town paper was received by the bank, whether for collection or as cash, the paper was identified by the letter F placed on the deposit ticket, and this mode of identification was carried through the books for the purpose of enabling the bank to protect itself at any time either before or after maturity of the paper by refusing to allow the depositor to draw against the paper, although it was credited as cash (Carr Test., pages 30, 31, 32, 33), and also if the paper were not paid by charging back the amount to the depositor and thus canceling the credit (Carr Test., pages 34, 35). See also test. of Barrow (pages 62, 63); that it was his business to watch all foreign checks deposited for the purpose of charging the depositors with interest and exchange in cases where the amount of such checks was too large.

21. It is quite clear, therefore, that even if a foreign check was credited as cash such credit was conditional, and that the bank reserved and exercised the right of canceling the credit either before or after maturity, which is inconsistent with the idea that the draft so deposited became the absolute property of the bank (15 Fed. Rep., 683).

22. Against this mass of evidence nothing was proved against the appellant except the fact that in keeping its check-book the appellant entered the draft as a deposit and included its amount as the balance in the bank. Such fact does not prove that the appellant intended to transfer the draft to the bank or that it would have drawn against such draft. The check-book was kept in the ordinary way, and the draft was entered by itself as a separate deposit, so as to show at once what the item was. Such drafts were never due

sooner than the next day after they were drawn and deposited, and appellant had the means of identifying the draft, and thereby knowing exactly the balance (excluding such draft) against which the appellant was entitled to draw. As Butler says, p. 17, "We kept a balance there without regard to the collection of any paper, and we should not draw against that paper until we knew or got notice that it was paid." Again he says, p. 17, "We draw against what we had and not against what we did not have."

Fourth Point.

The evidence fails to establish that there had been any previous transaction between the parties of sufficient duration or of sufficient frequency to establish an unequivocal cause of dealing between the parties in respect to such transactions, or that from such previous transactions an agreement such as is contended for by defendant can fairly be implied.

Scott vs. Ocean Bank, 23 N. Y., 289.

1. Besides the transactions in question, there were only four occasions in which a draft had ever been deposited by appellant with the Marine Bank.

   See Statement of Facts, Articles XIII. to XVIII.

2. These occasions were as follows:

   August 23, 1883, $4,750; Record, p. 83.
   " 27, 1883, $19,050; " " 82.
   Nov. 3, 1883, $17,835 " " 82.
   April 10, 1884, $18,930; " " 82.

3. On two occasions, viz., August 23, 1883 (Record, p. 45), and Nov. 3, 1883 (Record, pp. 29, 36, 37, 48), no entry was made in the pass-book at the time of the receipt of the draft, and the entry was made afterwards by one of the bookkeepers (the evidence being that such entries were made by the bookkeepers only when they were engaged in balancing the pass-book), and the book-keeper who made these two entries was not called.

4. On the other two occasions, August 27, 1883 (Record, p. 45), and April 10, 1884 (Record, p. 43), the drafts were entered in the pass-book, but as to the first of these, Rossell, p. 45, says that he cannot say that he received it, and that he may have entered it in the pass-book after it had been received by some one else, and as to the second of these Rossell says (pp. 44–46), that he has no recollection of the transactions independently of the entry, and there is nothing to show that the entry in the pass-book was made at the time or before the collection of the draft, or that the appellant had any knowledge in regard thereto until after the draft had been collected.

5. But furthermore these four previous transactions are controlled by the same facts which apply to the deposit of the draft in suit, viz., that at those times the appellant was a creditor and had a large amount on deposit; that it did not request the bank to credit the items as cash; that it was not authorized to draw, and never did draw, or felt justified in drawing against such drafts, and that the bank kept itself in a position to protect itself by canceling the credit or charging back the drafts, and that there is no sufficient evidence to show the appellant's assent to or knowledge of what was done in the bank in regard thereto.

6. It also appears that in regard to the item of November 3, 1883 (just as in regard to the draft in suit), application was made by Carr to the president for instructions as to receiving the draft, but this fact was not known or assented to by appellant, and Carr states expressly that no entry was made in the pass-book at the time.

We submit, therefore, that these previous transactions were insufficient to establish "an unequivocal course" of dealing between these parties, or to prove that the drafts deposited on those occasions were with the knowledge and assent of the appellant received and treated by the bank as cash.

But even if, on those previous occasions, or any of them, the draft deposited had been treated and considered as cash, such fact does not, in face of the positive evidence on the part of the appellant in regard to the draft in suit, prove that the latter draft became the property of the bank.

Fifth Point.

The Court below erred in its conclusion that the bill was not properly framed to enable the appellant to present the question of fraud in receiving the deposit in question based on the facts that the bank was insolvent at the time and that such insolvency was known to the officers and managers of the bank.

Opinion, p. 95.

I. In the opinion it is stated at the commencement that "the bank was insolvent at the time" (p. 92), and at the close of it (p. 95) it is said: "There is no allegation in the bill that the officers of the bank entertained

any fraudulent intention towards the plaintiff in using the paper and the bill does not proceed upon that theory." Also that although the bank was insolvent at the time and was known so to be to the officers of the bank, they were under no legal obligation to divulge the fact. And the further principle is stated, "that fraud cannot be imputed to a party who contracts an obligation, knowing himself to be insolvent, merely because he omits to disclose the fact to the other contracting party." Several authorities, such as Nichols vs. Pinner, 18 N. Y., 295, are cited in support of these latter propositions.

In the concluding paragraph of the Opinion it is stated, "If the bill were properly framed to present the question of fraud the facts disclosed in the proofs might justify the conclusion *that the affairs of the bank were so hopeless and presumably known to be so to its officers as to preclude the existence of an honest expectation on their part to repay the plaintiff's deposit.*

II. The Court below erred not only in assuming that the bill should allege the same facts which it would be necessary to aver and prove in an action at law against an officer of the bank to recover damages for having fraudulently obtained the property of the depositor, and that the allegations in the bill would be insufficient to sustain such an action, but also in the statement of the principles applicable to that class of actions.

III. None of the cases cited by the Court go further than to hold that the omission of a trader to declare his insolvency will not *per se.*, and in the absence of other facts prove fraud because he is not obliged to divulge his condition when not asked, and because using the language of the cases, "an honest though abortive purpose to continue business and pay for the goods is consistent with the knowledge of insolvency, and a

purchase with that (*honest*) intent is not fraudulent," but no case holds that there was no fraud where the evidence was sufficient (as the Court, in this case, conceded it to be, p. 95), to "preclude the existence of an honest expectation on the part of the officers of the bank to repay plaintiff's deposit" (Anonymous, 67 N. Y., 598).

IV. The rule applicable to traders has no application to banks, and especially "National Banks," and while it may be true that a trader is not obliged to divulge his condition unasked, yet when a bank becomes insolvent and the fact is known to its officers, it is the duty of the bank to close its doors, and any party dealing with it as a depositor may be supposed to make the inquiry as to the condition of the bank, and a continuance of business after known insolvency is a fraud.

In 67 N. Y., 598, above cited, as appears by the statement of facts, at the time plaintiff purchased the draft from the defendants (bankers) the latter were hopelessly insolvent, and this condition of affairs was known to them. The Court held that the defendants were guilty of a fraud in contracting the debt for which the action was brought and an order of arrest against them was properly granted.

In that case in speaking of the obligation of a trader the Court says: "This is not like the case of a trader "who has become embarrassed and insolvent, and yet "has reasonable hopes that by continuing in business "he may retrieve his fortunes. In such a case he may "buy goods on credit, making no false representations, "without the necessary imputation of dishonesty. "(*Nichols vs. Pinner*, 18 N. Y., 295; *Brown vs. Mont-"gomery*, 20 *Id.*, 287; *Johnson vs. Morrell*, 2 Keyes, "655; *Chaffee vs. Font*, 2 Lans., 81). But it is believed "that no case can be found in the books holding that a "trader who was hopelessly insolvent and knew that he "could not pay his debts, and that he must fail in busi-

" ness, and thus disappoint his creditors, could hon-
" estly take advantage of a credit induced by his ap-
" parent prosperity, and thus obtain property which he
" had every reason to believe he could never pay for.
" In such a case he does an act, the necessary result of
" which will be to cheat and defraud another, and the
" intention to cheat will be inferred."

And the Court in that case (see Syllabus) further decided " that in the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders. A banker who is, to his own knowledge, hopelessly insolvent cannot honestly continue his business and receive the money of his customers ; and although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, *i. e.*, to cheat and defraud all persons whose money be receives, and whom he fails to pay before he is compelled to stop business."

See also Cragie vs. Hadley, 99 N. Y., 134.
Furber vs. Stephens, 35 Fed. Rep., 17.

V. We submit that the allegations in the bill are sufficient to enable the appellant to present the question of fraud on the part of the Bank (Record, p. 2). The bill alleges :

1. That on May 5 the bank was insolvent and that the fact was well known to its officers.

2. That the bank well knowing the fact wrongfully neglected to disclose the fact.

3. And by continuing business with open doors and otherwise represented that it was solvent.

4. That on the faith of such representations and relying thereon and without knowledge or suspicion that it was insolvent or in danger of becoming so, appellant delivered the draft.

5. That on the next day, May 6, it did not open its doors and its insolvency became open and notorious.

VI. It is not necessary, as the Circuit Judge supposed, that the bill should in terms allege "that the officers of the Bank entertained any fraudulent intention towards the plaintiff in receiving the paper."

1. The rule in regard to the false representations, as laid down by the Court of Appeals of New York in the case cited below, is that the combination of these three circumstances is sufficient to entitle the injured party to relief at law or in equity; "first, that the representation is contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; thirdly, that it should be this false representation which gave rise to the contracting of the other party."

Overlander vs. Speiss, 45 N. Y., 175, following Attwood vs. Small, 6 Cl. & F., 444.
Henderson vs. Lacon, L. R., 5 Eq., 249.
Ship vs. Crosskill, L. R., 10 Eq., 73, 85.

2. The legal inference from the facts alleged in the bill is that the Bank and its officers intended to do that which is the natural consequence of its acts and the acts of its officers.

The principle is thus stated by Pomeroy: "If a representation made prior to the transaction and directly relating to it is of such a character that it would naturally and reasonably induce, or tend to induce, any ordinary person to act upon it, and enter into the contract, or engage in the transaction, and is in fact followed by such action on the part of the other person,

then it will be presumed that it was made for the purpose of, and with the design of, inducing that person to do what he has done. The design will be inferred from the natural and necessary consequences."

2 Pom. Eq., § 880.

3. In its opinion the Court below held that the allegation in the bill that the bank and its officers knowing the fact of insolvency, wrongfully concealed it and represented the bank to be solvent did not constitute a charge of "fraudulent intention." This is answered by what has been already said, and also by the Court of Errors of New York, who said: "The books state that 'falsely and fraudulently' are equivalent to 'knowingly,' and they go upon the principle that the bill must allege *either* fraud in terms *or* knowledge of the falsehood of the representation."

Bayard vs. Malcolm, 2 Johns. R., 550.

This case was followed by the Court of Appeals in 25 N. Y., 244, where Judge SELDEN held that the words "falsely and fraudulently" are equivalent to "*scienter*."

Thomas vs. Beebe, 25 N. Y., 244.

In the case before the Court, the "*scienter*" is expressly charged.

4. The facts alleged in the bill constitute a fraud upon the plaintiff within all the cases, and that being so, it is in the language of Lord ROMILLY, M. R., "perfectly unnecessary to allege the fraudulent intention, nor will the word 'fraud' create fraud if the facts themselves do not establish it."

Ship vs. Cross Kill, L. R., 10 Eq., 73, 85.

Sixth Point.

The evidence established the fact that the bank was insolvent and its condition known to its officers on May 5, 1884, when the draft was delivered.

I. It is decided in 99 N. Y., 135, above cited, that notice to an officer of the bank is notice to the bank, Op., p. 135, and that if its insolvency was known to the officers and agents a fraud was perpetrated on the depositor in permitting him, in reliance on its supposed insolvency, to make the deposit; also, that the presumption is that the manager, officers and agents had notice of its condition arising from the circumstances, and that they could not have been ignorant without imputing to them gross inattention to its affairs.

In Martin vs. Webb, 110 U. S., 7, this Court decided that "That which directors ought by proper diligence to have known as to the general course of the business of a bank they may be presumed to have known in any contest between the corporation and its dealers."

And the principle is recognized by the Court below in its opinion, p. 95.

II. The evidence established that the bank was insolvent on the preceding Saturday, the 3d of May, 1884, and for many days previously and, in fact, had been so for a year.

1. The fact that it was insolvent when it received the draft is stated in the opinion (p. 92), and the fact that it had been for a long time hopelessly insolvent is substantially conceded by the Court in the closing paragraph of the opinion.

2. The fact is placed beyond doubt by the testimony of the defendant (Record, pp. 73–74), where it is

said that the bank had been insolvent for more than a year (p. 75); that it was insolvent from the time that the indebtedness from Grant & Ward, considering them insolvent always had grown to such a point that if not paid it would have rendered the bank unable to pay its debts.

3. At p. 73 the defendant said that the indebtedness of Grant & Ward, for which he got judgment, was $732,000, that Ferdinand Ward's individual account was overdrawn on Saturday, May 3d, $140,000 (p. 73), and that Grant & Ward's general account was overdrawn on May 3d $350,000, and that Grant & Ward's special account was overdrawn $350,000 (p. 74); and that the bank was insolvent on May 3d (p. 74); and that when the Receiver took charge the bank owed $5,000,000, and the deficiency of assets was 35 per cent., about one and a half millions (p. 74).

III. Camp (p. 68) says that on the morning of May 6th the Marine Bank owed the Clearing House for the transactions of May 5th $550,000 and that Fish, the president, said that the bank did not have that amount of money, and thereupon Fish sent a messenger to the bank who returned with $210,000 in legal tender notes, and the pocket book of the bank with all its bills receivable, and subsequently, in the same way, all the collaterals held by the bank for its call loans were likewise sent up; and on these securities a loan of $345,000 was obtained by Fish from Baldwin, the president of the Fourth National Bank (pp. 70, 71), and with the amount thus procured and the $210,000 the indebtedness of the Marine Bank to the Clearing House was paid.

See, in the same connection, the testimony of Carr (pp. 39, 40, 41 and 42), who testifies that on the morning of the 6th of May he was sent by the cashier, Da-

boll, to the Clearing House to see Fish, the president of the Marine Bank, and remind him of some checks of Ward on the First National Bank which Ward had deposited on the day before, amounting to $215,000; and that he stated this to Fish, whom he found in the office of Mr. Camp, the manager of the Clearing House. That by request of Fish the witness borrowed from the Fourth National Bank a trunk which witness took to the Marine Bank and told Cashier Daboll that Mr. Fish wanted witness to bring up all the good collaterals we had in the bank to the Clearing House, and Daboll told Fish's son, and they, the cashier and assistant cashier, went into the vault and selected the securities, and when the box was filled took it up to the Clearing House, but no list of the securities was made at the time they were taken out of the bank, but one was afterwards made.

We submit that under these circumstances there can be no question that the bank was hopelessly insolvent on the 3d day of May, 1884, and that the fact was well known to Fish, the president of the bank; and in accordance with well settled principles, such notice to Fish was notice to the bank and charged the latter with knowledge of anything which Fish actually knew, or which he was presumed or bound to know, and that in receiving the draft in suit the bank was guilty of a gross fraud.

Seventh Point.

The decree should be reversed.

JOHN E. BURRILL,
Of Counsel for Appellant.

Office Supreme Court U. S.
FILED.
JUL 18 1889
JAMES. H. McKENNEY,
CLERK.

United States Supreme Court.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,

Appellant,

against

WALTER S. JOHNSTON,

Appellee.

Brief for Appellee.

CHARLES E. MILLER,
Of Counsel for Appellee.

NEW YORK:
ALBERT B. KING, PRINTER, 19 LIBERTY STREET.
(Telephone, John 875.)

1889.



United States Supreme Court.

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against

WALTER S. JOHNSTON,
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Brief for Appellee.

Statement.

This is an appeal from a judgment at Circuit for the Southern District of New York dismissing the complaint. The action is brought to recover in full a deposit of $17,835 made by plaintiff in the Marine National Bank of the City of New York, on the 5th day of May, 1884.

The bank failed on the following day and defendant was appointed Receiver.

For more than five years prior to that time plaintiffs kept an account with the Marine Bank making deposits with and drawing checks upon the bank from time to time (fol. 13 *et seq.*).

On that day plaintiff deposited with the bank a sight draft to the order of the bank for $17,835, dated that day and drawn by the plaintiff upon the treasurer of

the Atchison, Topeka & Santa Fe Railroad Company of Boston, Mass. (fols. 13, 18).

At the time of making the deposit a ticket was sent to the Marine Bank (fol. 18) by plaintiff, setting forth that plaintiff had deposited with the bank a check for $17,835. No instructions were given by plaintiff to the messenger who took the draft to the bank or to the bank (fol. 26).

The draft was on that day entered by the receiving teller of the bank in the books of the bank as a deposit of cash by plaintiff (fols. 33, 34, 46, 55, 88).

On several prior occasions during the time the plaintiff kept an account with the bank, plaintiff deposited similar paper at the same time with money and upon similar deposit tickets, and the bank credited the plaintiff upon its books and also upon the pass books of plaintiff with the amount of such paper as a cash item (fols. 44, 47, 54, 65, 66, 68, 74, 76, 80, 95, 96, 97, 114, 115, 116 *et seq.* 124, 125, 126).

The plaintiff also entered the amount of such drafts in a memorandum of deposit kept in its check book among cash items (fols. 116, 126 *et seq.*, 130).

No entry was made in the pass book of plaintiff at the time of making this deposit, for the reason that such book was then at the bank, having been previously sent there to be written up (fol. 31).

Plaintiff was in the habit of drawing against its balance in the bank whatever it was (fol. 23).

It had no occasion to draw against any deposits of this character (fol. 25), but drew against its gross balance in the bank whatever it was (fol. 23).

POINTS.

I.—The deposit of a check in a bank accepted by it and credited to the depositor creates a debt and vests the property in the check in the bank.

Met. Nat. B'k *vs.* Loyd, 90 N. Y , 530.
Cragie *vs.* Hadley, 99 N. Y., 131.
Bank of The Republic *vs.* Millard, 10 Wall., 152.
Scammon *vs.* Kimball, 92 U. S. R., 362–370.
Libby *vs.* Hopkins, 104 U. S. R., 303–308.

In the case at bar, the draft was deposited without any instructions, and the usual deposit ticket of deposit of cash delivered to the bank. The bank at once credited it to the plaintiff as cash. The debt was thereby at once created. The bank became the owner of the check, and not an agent for collection.

The fact that it was not immediately entered in the pass book of plaintiff, which was then in the bank, is utterly immaterial. Plaintiff, on showing the deposit, the deposit ticket and the credit to them in the bank books, could have recovered as for a loan to the bank.

It had been customary in dealings between the bank and plaintiff to make such deposit of foreign paper, and in every case it had been entered as cash in plaintiff's pass book. This plaintiff knew, and it will be presumed that it intended the same arrangement in this case.

The facts all point unerringly in that direction, and there is not a particle of evidence or claim of any of the witnesses to the contrary.

Plaintiff's witnesses, Lillie and Butler, testify to an

the Atchison, Topeka & Santa Fe Railroad Company of Boston, Mass. (fols. 13, 18).

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The facts all point unerringly in that direction, and there is not a particle of evidence or claim of any of the witnesses to the contrary.

Plaintiff's witnesses, Lillie and Butler, testify to an

absence of any verbal or written agreement, and nothing else, and that they never drew against deposits of out of town paper before its collection. In the absence of any such agreement the law puts it own construction upon the dealings between the parties, and that construction in this instance is, that the transaction was the ordinary one of a deposit of cash, by which the bank at once became the owner of the draft and a debtor to plaintiff.

The reasons given by them for this want of understanding, and for not drawing, were these: There were no deposits of out of town paper; or, if so, they were very small amounts, and that there were, therefore, no dealings from which any arrangement could be implied (fols. 98 to 100, 107).

But it appeared that these witnesses were entirely mistaken as to such dealings. They were not infrequent, and were of large amounts. Their testimony, therefore, is utterly valueless. The following deposits of out of town paper were made by plaintiff with the Marine Bank during the year preceding the failure: November 3, '83, $17.835; April 10, '84, $18,930; August 27, '83, $9,050; August 23, '83, $4,750. In each of these cases the deposit ticket was as of cash, and the deposits were in each instance credited to plaintiff in its bank book on the day of the deposit, and the plaintiff itself, in its own check book, entered them as ordinary deposits of cash.

II.—The law will not presume, from the mere fact that this deposit was of out of town paper, that any different result followed from the deposit than in the case of other paper. No such distinction exists in law,

and no custom or course of dealing has been shown to create any such distinction.

The case comes before the Court as an ordinary deposit of cash or checks.

III.—The case of Scott *vs.* The Ocean Bank, 23 N. Y., 289, cited by appellant's counsel, is not in his favor.

The Court, in that case, bases its decision mainly upon the fact that neither by express agreement nor by any previous dealings was it shown that the depositor was entitled to a credit for bills remitted by him.

At page 290 the Court say: "It is not shown nor claimed that there was an express agreement between the company and Lyell that he should, on the receipt by it of the bills remitted, be entitled to have a credit in the account between them for the amount thereof; nor is it found that in the course of the dealings between them any credit was in fact ever given to him for any of such bills until the proceeds thereof were realized and received."

And at page 292 the Court say: "When, therefore, it appears that the bill in question was retained in the possession of the company after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings, between the parties, to show that any bill was ever credited or agreed to be credited in account before its collection, or that Lyell ever drew, or was entitled to draw, upon the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash it must be considered that the company, at the time of the transfer, stood in the relation of agents for its collection merely."

In the case at bar, the facts clearly establish a course of dealing between the parties of credits for similar bills at the time of their deposit, and the Court has so found.

In the Scott case the Court also dwells upon the fact that the depositor himself was not a party to the bill.

In Dickinson *vs.* Wason, 47 N. Y., 439, the note was in terms sent for collection.

In Balbach *vs.* Frelinghuysen, 15 Fed. Rep., 683, cited by plaintiff, the Court lays stress upon the fact that the account between the parties had not changed between the date of the deposit and the failure of the bank, and that no draft had been drawn by the depositor.

In the case at bar the plaintiff did draw checks after the deposit, and before the failure, against its gross balance in the bank, and such checks were paid and the account between the parties had changed after the deposit (fols. 16, 23, 24).

IV.—If it was the fact that the bank was insolvent when the deposit was made, it would not affect the transaction.

(*a*) Fraud cannot be imputed to a party who contracts a debt, knowing that he is insolvent, merely from the fact of his insolvency and his omission on a purchase of property on credit to disclose that fact to his vendor.

Nichols *vs.* Pinner, 18 N. Y., 295.
Nichols *vs.* Pinner, 23 N. Y., 264.
Wright *vs.* Brown, 67 N. Y., 9.
People's Bank *vs.* Bogart, 81 N. Y., 108.
Morris *vs.* Talcott, 96 N. Y., 100.

And in Metropolitan Bank *vs.* Loyd, *supra*, the Court say: "There is no allegation in the answer that fraud was practiced by the bank upon Murray, or that in receiving the deposit and giving credit to him there was any intent to withhold the sum credited, or that it was done in contemplation of insolvency. Moreover, it is plain that the bank continued, after the deposit, debtor to Murray by his own choice, and not by reason of its solicitation or act. He could have drawn the amount the moment credit was given, and in not doing so consulted his own pleasure or convenience."

The facts are precisely similar in this case. There were no representations of any kind made by the bank to plaintiff, nor was the deposit received in contemplation of insolvency. A rule which would avoid all the transactions with a bank after it became actually insolvent would prevent all business dealings and all struggles by insolvents to retrieve their position. Nor would it benefit the depositor, as it would apply equally to all depositors, and the result would practically be the same.

Nor is there any evidence of fraudulent intent on the part of the officers of the bank or of knowledge by them at the time of receiving the deposit of the insolvent condition of the bank.

The sole evidence on the subject of the insolvency was that of Mr. Johnston, the receiver, who testified that the bank was insolvent on the third of May (fol. 111), basing that conclusion on his estimates of the values of the assets (fol. 111), and on facts which came out after the bank closed (fol. 113).

The insolvency arose from the large indebtedness of Grant & Ward to the bank, which that firm was unable to pay (fols. 110 to 114). But so far as appears none of the officers of the bank knew of the insolvency of Grant & Ward, nor does it appear when that firm became insolvent.

Certainly neither knowledge nor fraudulent intent can be predicated merely on the testimony of a witness as to what he considered to be the actual value of the bank assets. That is a question as to which persons might very easily and honestly differ, such assets consisting mainly of commercial paper, as to the value of which opinions even of the best informed persons would vary largely.

V.—There is no evidence that the directors of the bank had any knowledge of its condition. Such knowledge cannot be presumed where fraud is charged.

Wakeman *vs.* Dalley, 51 N. Y., 27.

Knowledge by any of the officers of a bank of its insolvency, is insufficient to avoid transactions between the bank and its customers, on the ground of fraud, unless the evidence clearly shows that the directors who represent the corporation, also had such knowledge.

Balbach *vs.* Frelinghuysen, 15 Fed. Rep., 683.

VI.—The bill contains no allegation that the officers of the bank entertained any fraudulent intention toward the plaintiff in receiving the deposit, and a recovery cannot be had upon that theory. The decree must be *secundum allegata*.

VII.—The judgment of the Court below should be affirmed, with costs.

CHARLES E. MILLER,
Of Counsel for Appellee.